Ninth Circuit Case Law (2016-2018)

This guide consists of summaries prepared primarily by the judicial law clerks and attorney advisors at the San Francisco Immigration Court. It is not intended as an exhaustive treatise on the nuances of individual cases or their interaction with other circuit precedent.

I. Asylum & Withholding of Removal

A. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (en banc)

Issues: Government Unable or Unwilling to Control, Country Conditions Evidence, Burdens

Holding: An applicant's failure to report abuse to government authorities neither creates a "gap" in the evidence nor does it impose a heightened evidentiary requirement on the applicant. Credible testimony, reports of similarly situated individuals, and country conditions reports can establish the "unable or unwilling to control" prong.

Practical Effect: IJs should not cite *Castro-Martinez v. Holder*, 674 F. 3d 1073 (9th Cir. 2011) or other circuit precedent for the proposition that a failure to report to government officials leaves an evidentiary "gap" about how the government would respond if the applicant would have reported the acts of persecution. IJs should continue to rely on credible testimony, country conditions documentation, and "all relevant evidence in the record."

Case Summary: Bringas, a native and citizen of Mexico, applied for Asylum, Withholding of Removal, and protection under CAT based on sexual abuse he experienced as a child. Bringas's persecutors targeted him because of his sexual orientation. The IJ and BIA found his testimony credible, but denied relief, finding his evidence was insufficient to establish that the Mexican government was unable or unwilling to control the private individuals who attacked him.

The Ninth Circuit, sitting en banc, partially overturned *Castro-Martinez v. Holder*, *Afriyie v. Holder*, 613 F. 3d 924 (9th Cir. 2010), and *Rahimzadeh v. Holder*, 613 F. 3d 916 (9th Cir. 2010), explaining that these cases unnecessarily introduced a presumption that an applicant's failure to report persecution creates a "gap" in the evidence. The Court explained that despite Bringas's failure to report his abuse, Bringas's credible testimony, accounts of his gay friends who attempted to report sexual abuse, and the country conditions reports established that he suffered past persecution that the Mexican government was unable or unwilling to control. The Court emphasized that government efforts to prevent violence and discrimination do not necessarily reveal anything about the actual country conditions.

B. *Perez-Guzman v. Lynch*, 835 F.3d 1066 (9th Cir. 2016)

Issues: Asylum, Withholding-Only, Reinstatement of Prior Removal Order, *Chevron* Deference

Holding: The Ninth Circuit accorded *Chevron* deference to the agency's interpretation of INA § 241(a)(5) and held that an alien whose prior order of removal has been reinstated may not apply for asylum.

Practical Effect: In withholding-only proceedings, the IJ may not grant the applicant's request to apply for asylum under INA § 208.

Case Summary: The panel applied *Chevron* and examined the interplay of the asylum statute, INA § 208(a)(1), which states that "any alien who is physically present in the United States . . . irrespective of such alien's status may apply for asylum in accordance with this section," and the reinstatement bar, INA § 241(a)(5), which states that, where an alien's prior order of removal is reinstated, "the alien is not eligible and may not apply for any relief under this chapter[.]"

Applying the first step of *Chevron*, the panel concluded that Congress "has not directly spoken to the interplay of [INA § 208(a)(1) and INA § 241(a)(5)]." The panel applied a cannon of statutory construction, examined the Act's language, and looked at legislative history to reach that conclusion.

The panel next looked to whether "the agency's interpretation of an ambiguous statute is a permissive construction of the statutory scheme." The panel held that 8 C.F.R. § 1208.31(e), "which prevents individuals subject to reinstated removal orders from apply for asylum, but permits them to seek withholding of removal," is a reasonable interpretation of INA § 208(a)(1) and INA § 241(a)(5), even though it forecloses individuals from applying for asylum relief. The panel noted that "the agency's approach is consistent with Congress' intent in IIRIRA that the reinstatement of a previous removal order would cut off certain avenues for relief from removal."

Finally, the panel noted a tension between 8 C.F.R. § 1003.31(e) and INA § 208(a)(2)(D), the latter of which permits an "application for asylum" if the alien demonstrates changed circumstances that materially affect the applicant's eligibility for asylum. The panel noted that "the Attorney General [may] elect[] to place an individual who previously applied for and was

denied asylum into ordinary removal proceedings upon his reentry to the United States," thereby authorizing a second asylum claim under INA § 208(a)(2)(D) in light of changed circumstances. In footnote 10, however, the panel stated that the two provisions were not actually in conflict in this case and "therefore we have no opportunity to determine how INA § 208(a)(2)(D) might affect INA § 241(a)(5) in a case where those two provisions are actually in conflict."

C. *Tellez v. Lynch*, 839 F.3d 1175 (9th Cir. 2016)

Issues: Reinstatement of Removal, Reentry, Inspection of Aliens for Admission

Holding: When an alien is issued an expedited removal order at a United States border-crossing checkpoint, the alien has "entered" the United States for the purpose of the reinstatement provision's "reentry" requirement under INA § 241(a)(5).

Practical Effect: The Ninth Circuit limited its holding to the reinstatement of removal provision under INA § 241(a)(5). Immigration Judges may have to apply a different definition of "entry" in another context.

Case Summary: Petitioner attempted to cross the border in 2000 by falsely claiming to be a United States citizen. After admitting that she was a citizen of Mexico at secondary screening, the Petitioner was issued an expedited removal order under INA § 235(b)(1) and was returned to Mexico. The following week, Petitioner returned to the United States as a passenger in a car which was waived through at the border. In 2012, Petitioner applied for a waiver of inadmissibility and adjustment of status to that of a lawful permanent resident. DHS denied her applications and reinstated her prior order of removal.

Petitioner argued that her initial attempt to enter the United States, which resulted in an expedited removal order under INA § 235(b)(1), did not constitute an "entry" within the meaning of the reinstatement of removal provision. The panel rejected Petitioner's argument, holding that an "entry" for the purposes of the reinstatement of removal provision, INA § 241(a)(5), occurs when an alien crosses the border and comes "into the sovereign territory of the United States[.]" The panel recognized that the Ninth Circuit has applied a different definition of "entry" in criminal reentry cases, but concluded that the plain language of the INA, together with legislative

history, supported its interpretation, which was limited to the reinstatement of removal provision under INA § 241(a)(5). Thus, Petitioner's second, 2012 entry into the United States constituted a "reentry" and the reinstatement of her prior order of removal was proper.

D. *Lemus v. Lynch*, 842 F.3d 641 (9th Cir. 2016)

Issues: Cancellation of Removal, Retroactive Application

Holding: The holding in *Holder v. Martinez Gutierrez*, 123 S. Ct. 2011 (2012) applies retroactively, such that an applicant for cancellation of removal must satisfy the years-of-residence requirement independently, without relying on a parent's residential history.

Practical Effect: When determining whether an applicant for cancellation of removal has satisfied the requirement of seven years continuous residence after having been admitted in any status, Immigration Judges should only consider the applicant's independent ability to satisfy this requirement, without imputing a parent's residence period.

Case Summary: Petitioner entered the United States in 1993 and became a lawful permanent resident through his stepfather in 2006. In 2011, Petitioner committed a drug trafficking offense and pled guilty to making a materially false statement to a federal officer. DHS then charged him with inadmissibility as an alien who was or had been a trafficker in illicit controlled substances. He sought relief through cancellation of removal and acknowledged that he could not independently satisfy the seven-year continuous residency requirement. Instead, he argued that he satisfied the requirement by imputing his stepfather's years of residency to himself.

Petitioner argued that the Supreme Court's holding in *Holder v. Martinez Gutierrez*—that applicants for cancellation must satisfy the years-of-residency requirement on their own—should only apply prospectively because he relied on then-controlling Ninth Circuit case law when he pled guilty. The panel disagreed, stating the default rule dictates that a court's decisions apply retroactively to all pending cases.

E. *Riera-Riera v. Lynch*, 841 F.3d 1077 (9th Cir. 2016)

Issues: Visa Waiver Program, Fraud, Asylum-Only Proceedings

Holding: The limitations on the alien's right to contest removal contained in the Visa Waiver Program apply even where an alien ineligible for the program fraudulently enters through it. Accordingly, the panel determined that the Board of Immigration Appeals properly found the petitioner ineligible for adjustment of status.

Practical Effect: A respondent who is ineligible for the Visa Waiver Program but procured entry through the program by fraudulent means remains subject to the limitations on relief from removal contained in INA § 217(b).

Case Summary: Riera-Riera is a citizen of Peru who entered the United States in 1998 through the Visa Waiver Program ("VWP"). *See* INA § 217. Because Peruvian citizens are not eligible for VWP benefits, Riera-Riera used a fraudulent Italian passport to obtain entry through the program. He overstayed his 90-day period of authorized presence in the United States under the VWP. DHS subsequently encountered Riera-Riera and proceeded to remove Riera-Riera in the summary manner authorized by the VWP. Riera-Riera filed for relief from removal in asylum-only proceedings, including adjustment of status, asylum, withholding of removal, and protection under CAT.

The Immigration Judge and Board found Riera-Riera ineligible for adjustment of status because he waived his right to pursue non-asylum claims for relief upon his entry through the VWP. The Immigration Judge and Board then considered and denied his claims for asylum, withholding of removal, and CAT relief. On a petition for review, the Ninth Circuit panel identified the issue of fraudulent VWP entry as one of first impression and noted that the Second, Seventh, and Eighth Circuits came to the same conclusion, relying on 8 C.F.R. § 217.4(a): a fraudulent entrant under the VWP remains subject to the program's restrictions. The panel also postulated that § 217.4(a) is a reasonable interpretation of an ambiguous statute, and therefore deserving of deference under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). Finally, the panel held that the evidence did not compel granting any of the remaining applications and accordingly denied the petition for review.

F. *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016)

Issues: Particular Social Group

Holdings: (1) The Board's requirements of particularity and social distinction, as stated in *Matter of W-G-R-* and *Matter of M-E-V-G-*, are reasonable and entitled to deference under *Chevron*. (2) The Immigration Judge committed error by implicitly finding that killings cannot constitute torture and by not considering all possible sources of torture. (3) The Board impermissibly conducted additional fact-finding in analyzing evidence of government acquiescence to torture.

Practical Effects: (1) Immigration Judges may cite *Matter of W-G-R-* and *Matter of M-E-V-G-*, which remain authoritative statements of the "particularity" and "social distinction" requirements for a particular social group. (2) Killing can constitute torture for the purposes of relief under CAT.

Case Summary: In a unanimous opinion, the Ninth Circuit panel held that the Board's requirements of particularity and social distinction were reasonable interpretations of the undefined term "particular social group," warranting deference under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). The panel held that the particularity requirement is reasonable because it ensures that proposed groups are "discrete" and not "amorphous," and that the social distinction requirement is also reasonable. The panel rejected petitioner's arguments that the social distinction requirement is a new requirement rather than a renaming of the social visibility requirement and that social distinction is redundant in light of the nexus requirement.

G. *Sanjaa v. Sessions*, 863 F.3d 1161 (9th Cir. 2017)

Issues: United Nations Convention Against Transnational Organized Crime, Withholding of Removal, Nexus

Holding: The United Nations Convention Against Transnational Organized Crime ("UN-CATOC") does not provide an independent basis for relief from removal in immigration proceedings.

Practical Effect: Respondents may not seek relief from removal under the UN-CATOC.

Case Summary: The panel first held that the BIA did not err in finding that Petitioner's past persecution was not on account of political opinion or whistleblowing where the assailants stated that their attacks were motivated by Petitioner's participation in the drug trafficking investigation. As to a separate beating that occurred after Petitioner quit the police force, the panel concluded that the evidence did not compel the conclusion that the beating was on account of his membership in a particular social group comprised of ex-police officers as opposed to purely personal retribution.

The panel also rejected Petitioner's argument that Article 24 of the UN-CATOC provides a form of relief from removal. Article 24 states that "[e]ach State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses . . . ." Because the treaty has not been implemented by Congress, the panel considered whether the treaty was self-executing. Noting the permissive language of the treaty, the panel adopted the reasoning of the Second Circuit in *Doe v. Holder*, 763 F.3d 251 (2d Cir. 2014), held that the treaty was not self-executing, and thus could not provide an independent basis for relief from removal in immigration proceedings.

H. *Song v. Sessions*, 882 F.3d 837 (9th Cir. 2017)

Issues: Asylum, Imputed Political Opinion

Holding: The panel vacated the denial of asylum finding that the Chinese government imputed an anti-government, anti-eminent domain political opinion to petitioner and that imputation was one central reason for his persecution.

Practical Effect: IJs are to take a broader view in what could qualify as an actual political opinion in the asylum context – "taking into account the full spectrum" of petitioner's actions.

Case Summary: Petitioner was a Chinese citizen who protested the forced demolition of a building, which contained a commercial unit that he owned, because the government refused to properly compensate the owners. Petitioner went door to door in his neighborhood and organized a protest with his neighbors. Petitioner and his neighbors blocked the entrance to a local government building and held banners stating "opposed to forced demolition." A government official asked who was in charge of the protest, to which Petitioner replied that he and two

other neighbors were. Petitioner refused to end the protest unless they were given a "fair remedy and justice." The government official said the protest could not continue because it was "anti-government" and "not right," but the government would issue a decision on the demolition. After Petitioner received notice that the demolition would continue, he moved into the building and hung up a banner stating that he would rather die than give up his property. Petitioner was arrested and during his three day detainment, he was tortured and beat by the police. Prison officials accused Petitioner of being "anti-government," and "subvert[ing] the government." Upon release, Petitioner had to continue to check in with the police every week. Fearing he would be detained and tortured again, he fled to the United States.

The BIA upheld the IJ'S finding that Petitioner's actions were "motivated by a desire for increased compensation for his property, not by political views," and thus held the Respondent failed to establish a nexus to a protected ground based on his "personal dispute with the Chinese government over the value of his land."

The panel found that government officials at the protest and the police who arrested the petitioner imputed to him an anti-government, anti-eminent domain political opinion which was one central reason for his persecution. The panel found that the BIA and IJ took a too narrow view of what could qualify as an actual political opinion, citing to *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007) (that a political opinion is more than electoral politics or formal political ideology or action). The Ninth Circuit panel granted the petition for review, vacated the BIA's denial of asylum and remanded to the Attorney General to exercise his discretion whether to grant asylum.

II. Credibility & Corroboration

A. *Bhattarai v. Lynch*, 835 F.3d 1037 (9th Cir. 2016)

Issues: *Credibility, Corroboration, REAL ID Act*

Holding: To rely on omissions in record evidence such as a police report, doctor's report, or letters of support in rendering an adverse credibility determination, the IJ must apply *Ren v. Holder*, 648 F.3d 1079, 1093 (9th Cir. 2011), and provide the respondent

notice and an opportunity to present corroborating evidence or explain why it is not reasonably available.

Practical Effect: In making an adverse credibility determination, Immigration Judges must carefully distinguish inconsistencies (explicit details that differ among record evidence or the respondent's testimony or declaration) from corroboration issues (vagueness, lack of detail, or other things not in a record document that was in the respondent's testimony). If the IJ intends to use any record document submitted by a respondent in an adverse credibility finding as an omission or corroboration factor, then the IJ *must* give the respondent *notice and an opportunity* to present corroborative evidence or explain why it is not reasonably available. DHS questioning does *not* fulfill this requirement.

Case Summary: The Ninth Circuit articulated a two-step framework for reviewing an adverse credibility determination in which lack of corroboration is one of several stated grounds. First, the Ninth Circuit considers whether the "non-corroboration" grounds for the agency's adverse credibility determination—such as inconsistencies, implausibility, or demeanor—are supported by substantial evidence. If so, the Ninth Circuit defers to the agency. If not, and when lack of corroboration is the only remaining issue, the Court moves on to consider whether the agency satisfied the notice-and-opportunity requirement of *Ren v. Holder*, 648 F.3d at 1093.

The Ninth Circuit found that the agency's "non-corroboration" adverse credibility finding was unsupported by substantial evidence. The panel held that the omission of details about Petitioner's assault in a police letter was a corroboration problem—rather than an inconsistency—therefore, *Ren* applied, and the IJ had to provide notice and an opportunity to provide a contemporaneous report that detailed his assault or explain the inconsistencies.

Moving on to corroboration, the panel determined the agency did not satisfy *Ren*'s notice-and opportunity requirement. The panel held that the absence of testimony of Petitioner's brother, with whom he lived in the United States, could not be relied upon because the Petitioner was not given notice and an opportunity to present his brother as a witness pursuant to *Ren*. The panel emphasized that DHS questioning about why the brother did not testify did not satisfy *Ren*. In addition, the panel held that the absence of dates and details in letters of

support in Petitioner's application could not be used in an adverse credibility finding because the "IJ never mentioned the inadequacy of the supporting letters [Petitioner] submitted, or suggested a need for more specific documents corroborating dates and details [pursuant to *Ren*], until she announced her decision."

B. *Wang v. Sessions*, 861 F.3d 1003 (9th Cir. 2017)

Issues: Credibility, Corroboration

Holding: The Immigration Judge is not required to provide notice and opportunity to present evidence required by *Ren v. Holder* where the respondent fails to meet her initial burden to present credible testimony and the IJ considers but finds insufficient the corroborating evidence submitted.

Practical Effect: When an IJ has considered an applicant's testimony and corroborative evidence along with the totality of the circumstances and determines that she is not credible, the IJ need not afford an opportunity to provide additional corroborative evidence. *Ren* is triggered if the applicant is found credible but has failed to meet her burden of proof.

Case Summary: The petitioner is a citizen of China who sought asylum, withholding of removal, and protection under CAT, claiming that she was forced to undergo an abortion and to have intrauterine contraceptive devices (IUDs) inserted on two occasions in China. The IJ found her not credible and denied her application for CAT. The IJ emphasized the petitioner's vague testimony regarding her claim and discrepancies in the medical and marriage documentation that she submitted; the petitioner's responses also fluctuated when questioned about these discrepancies.

On appeal, the petitioner argued that the IJ (1) erred in making an adverse credibility determination based on her supporting documentation without determining that the documents were false or that the petitioner was so aware; (2) failed to specify inconsistencies in her testimony; and, (3) failed to provide her an opportunity to submit additional corroborative evidence. As to the first argument, the Ninth Circuit panel held that unlike the pre-REAL ID decision relied on by the petitioner, *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907 (9th Cir. 2004), the IJ had not focused on one questionable document in making its finding but instead relied on a range of factors regarding her

testimony. Next, the panel emphasized that the IJ may make an adverse credibility determination in the absence of inconsistencies in testimony; indeed, such a decision may be based on a range of factors, including those the IJ identified. *See* INA § 208(b)(1)(B)(iii).

Finally, the panel held that the petitioner's argument that the IJ erred in not affording her the process required by *Ren v. Holde*r, 648 F.3d 1079 (9th Cir. 2011) failed because the petitioner had not first provided credible, persuasive testimony sufficient to demonstrate that she is a refugee. The *Ren* requirements were therefore inapplicable to the petitioner's case and the panel stated, citing *Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011), that the IJ had "no obligation to give [the petitioner] an additional opportunity to bolster her case by submitting further evidence."

C. *Manes v. Sessions*, 875 F.3d 1261 (9th Cir. 2017)

Issues: Adverse Credibility, Demeanor

Holding: Substantial evidence supported the immigration judge's denial of asylum and withholding of removal relief on adverse credibility grounds because the IJ's demeanor findings were sufficiently specific, and the BIA and IJ provided specific and cogent reasons for why inaccuracies in the documentary evidence, and inconsistencies between petitioner's statements and other evidence of record, undermined his credibility.

Practical Effect: IJs may make an adverse credibility finding based on demeanor even if the IJ did not comment on-the-record at the time of the occurrence, as long as the IJ makes explicit reference to "specific examples" of the petitioner's unrecorded demeanor.

Case Summary: Relying on its decision in *Shrestha v. Holder*, 590 F.3d 1034 (9th Cir. 2010), the panel explained that IJs are in the best position to assess demeanor and other credibility factors. The panel rejected Manes's contention that the IJ should have commented on his demeanor during his hearing, so that the transcript would reflect the exact moments when the IJ assessed his demeanor. Instead, the panel held that an IJ is not required to conduct a "running commentary on the alien's credibility," and that an IJ can meet their obligation "to provide specific examples" of demeanor by "making explicit reference to particular unrecorded aspects of demeanor[.]"

D. *Dai v. Sessions*, 884 F.3d 858 (9th Cir. 2018)

Issues: REAL ID Act, Credibility

Holding: When neither the IJ nor the Board make an explicit adverse credibility determination, the Ninth Circuit must accept Respondent's testimony as true.

Practical Effect: IJs must make an explicit adverse credibility determination.

Case Summary: The panel explained that the REAL ID Act added a provision creating a rebuttable presumption of credibility where the IJ fails to make an explicit adverse credibility determination, but that presumption is rebuttable only before the Board, and is not rebuttable on petition for review before the Ninth Circuit. Where the credibility concerns do not justify a finding of adverse credibility, the concerns cannot be included in the persuasiveness inquiry as to undermine the finding that Respondent is credible.

Dissenting, Judge Trott wrote that the serious legal consequences of the majority opinion as a circuit precedent are that it (1) demolishes both the purpose and the substance of the REAL ID Act (2) disregards the appropriate standard of review, and (3) perpetuates this court's idiosyncratic approach to an IJ's determination that the testimony of an asylum seeker lacks sufficient credibility or persuasiveness to prove his case.

E. *Liu v. Sessions*, — F.3d —, 2018 WL 2450401 (9th Cir. June 1, 2018)

Issues: Corroboration

Holding: If corroboration is needed, the Immigration Judge must give the applicant notice of the corroboration that is required and an opportunity to produce the requisite corroborative evidence or to explain why that evidence is not reasonably available.

Practical Effect: The Court should continue to give the applicant notice that corroboration is necessary and an opportunity either to produce the corroborative evidence or to explain why that evidence is not reasonably available.

Case Summary: The respondent claimed the Immigration Judge failed to give him either notice that he needed to acquire corroborating evidence or time to acquire such evidence. The Immigration Judge determined that the respondent failed to provide

necessary corroborating evidence, had not suffered past persecution, and did not have a well-founded fear of future persecution. The Board of Immigration Appeals affirmed the Immigration Judge's findings.

The panel applied the standard for requesting corroborating evidence set forth in *Ren v. Holder*, 648 F.3d 1079, 1091 (9th Cir. 2011). Under that standard, the Immigration Judge may request additional corroborating evidence but must give the applicant notice that corroboration is needed and an opportunity either to produce the requisite corroborative evidence or to explain why that evidence is not reasonably available. In this case, the panel observed that the Immigration Judge provided notice to the respondent that corroboration was needed and gave him almost a year to submit such evidence. Based on this observation, the panel concluded the respondent was on notice that corroboration was necessary but failed to corroborate the claims in his petition. The panel denied his petition for review.

III. Cancellation of Removal

A. *Fuentes v. Lynch*, 837 F.3d 966 (9th Cir. 2016)

Issues: Admission, Cancellation of Removal for Certain Permanent Residents

Holding: One has not been "admitted in any status" for purposes of INA § 240A(a) solely by being listed as a derivative beneficiary on another's asylum application or application for relief under NACARA. Receipt of work authorization pursuant to 8 C.F.R. § 274a.12(c) similarly does not constitute admission for cancellation purposes.

Practical Effect: The seven year period of continuous residence for INA § 240A(a) cancellation begins at the time that a respondent was "admitted in any status." If a respondent was not admitted pursuant to the definition of admission in INA § 101(a)(13)(A) but has nonetheless received an immigration benefit or form of lawful status, the IJ may determine whether there are "compelling reasons" to deem the respondent's receipt of those benefits or status as being "admitted in any status" by analogizing to the results in *Matter of Reza-Murillo*, 25 I&N Dec. 296 (BIA 2010) (Family Unity Program ("FUP") participants are not considered admitted in any status for cancellation purposes) and *Garcia v. Holder*, 659 F.3d 1261 (9th

Cir. 2011) (those paroled as Special Immigrant Juveniles are admitted in any status for cancellation purposes).

Case Summary: Petitioner was admitted as an LPR in 2004 and committed a controlled substances offence in 2009. To meet the continuous presence requirement for cancellation, he argued that he was "admitted in any status" prior to becoming an LPR when he was listed as a derivative beneficiary on his mother's applications for asylum and relief under NACARA. He also argued that his having been granted work authorization constituted an admission.

The panel held that the Board properly concluded that neither being listed as a derivative beneficiary nor being granted work authorization constitutes an admission for LPR cancellation purposes. It reasoned by analogy that because those accepted into the FUP are not considered admitted under any status for cancellation purposes per the Board's decision in *Reza-Murrillo*, and because Petitioner's claim to admission is weaker than participants in that program, the Board properly determined that Petitioner had not been admitted in any status prior to 2004. The panel noted that Petitioner enjoyed fewer benefits than FUP participants, who have both applied and been accepted for a status, and have freedom to work and travel abroad, among other benefits. The panel continued to state that the result would have been identical prior to its decision in *Medina-Nunez v. Lynch*, 788 F. 3d 1103 (9th Cir. 2015), where the Court afforded *Chevron* deference to the Board's decision in *Reza-Murillo*, pointing to earlier cases which noted that simply submitting an application for relief does not trigger a change in immigration status.

B. *Mendez-Garcia v. Lynch*, 840 F.3d 655 (9th Cir. 2016)

Issues: Cancellation of Removal for Certain Non-Permanent Residents, Age-Out, Due Process for Discretionary Relief

Holding: An applicant for cancellation of removal for certain nonpermanent residents must demonstrate hardship to a qualifying relative at the time the application is adjudicated. The agency's failure to adjudicate cancellation of removal applications prior to the applicants' qualifying children turning 21 does not deny them due process.

Practical Effect: A "child" who turns 21 prior to the Immigration Judge's adjudication on the merits of an application for cancellation of removal is not a qualifying relative for purposes of INA §

240A(b)(1)(D). Immigration Judges should make efforts to calendar cancellation of removal cases to avoid age-out issues, particularly where the respondent shows diligence in attempting to secure a timely adjudication.

Case Summary: The Ninth Circuit consolidated the petitions for review of two petitioners who applied for cancellation of removal for certain nonpermanent residents. Both applicants' children were their qualifying relatives and had turned 21 prior to the final decisions in their cases. The petitioners argued first that the Board's interpretation of INA § 240A(b)(1)(D) requiring an exceptional and extremely unusual hardship to, among other people, an alien's "child", at the time the cancellation of removal application was adjudicated on the merits, was erroneous. *See Matter of Isidro-Zamorano*, 25 I&N Dec. 829, 830-31 (BIA 2012); *Matter of Bautista Gomez*, 23 I&N Dec. 893, 894 (BIA 2006). Finding that the plain language of the statute did not resolve the issue, the panel held that it was reasonable for the Board to conclude that the determination of whether a relative was a qualifying relative at the time of the IJ's decision—as opposed to when the application was filed—is reasonable. The panel specifically noted that the textual distinction between the specific 10-year physical presence language from INA § 240A(b)(1)(A) ("has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application") and the qualifying relative language in INA § 240A(b)(1)(D) bolstered the conclusion that the BIA's interpretation was reasonable.

C. *Guerrero-Roque v. Lynch*, 845 F.3d 940 (9th Cir. 2017)

Issues: Cancellation of Removal, INA § 212(h) Waiver

Holding: The INA § 212(h) waiver of inadmissibility cannot excuse convictions that bar an alien from cancellation relief under INA § 240A(b). Further, where an alien is found inadmissible because he entered without inspection and not on the grounds of his convictions, the § 212(h) waiver does not apply to the inadmissibility finding.

Practical Effect: The INA § 212(h) waiver provision may not be used to excuse convictions that bar relief under INA § 240A(b) and does not apply to inadmissibility determinations based on entering without inspection.

Case Summary: Petitioner applied for cancellation of removal pursuant to § 240A(b). The IJ concluded that Petitioner's four shoplifting convictions constituted crimes involving moral turpitude and that those convictions, as well as his marijuana possession conviction, disqualified him from seeking cancellation of removal under § 240A(b).

Petitioner argued that the § 212(h) waiver of inadmissibility should apply to § 212(a)(2), as a waiver of a ground of inadmissibility, and § 240A(b), as a waiver of a bar to cancellation of removal, because both § 240A(b) and § 212(h) refer to § 212(a)(2). The panel rejected this argument, stating that § 240A(b) does not refer to, or incorporate by reference, the inadmissibility waiver authority provided in § 212(h), and to waive Petitioner's disqualifying convictions for cancellation of removal purposes would render § 240A(b)(1)(C)'s express requirement that an alien not be convicted of an offense under § 212(a)(2) null. Therefore, the panel held that the waiver of inadmissibility may not be used to waive a conviction that bars relief under § 240A(b).

The panel also noted that the § 212(h) waiver specifically applies to an inadmissibility determination based on the criminal conduct specified in § 212(a)(2). Since Petitioner here was found inadmissible because he entered without inspection and not on the grounds of his shoplifting or marijuana possession convictions, the panel confirmed that the § 212(h) waiver provision does not apply to his inadmissibility finding.

D. *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017)

Issues: Withholding of Removal, Convention Against Torture

Holding: The Ninth Circuit held that the BIA erred in applying the REAL ID Act's "one central reason" nexus standard to a withholding of removal case because the text of the INA requires a less demanding "a reason" standard. The panel also held that there is no "rogue official" exception to the Convention Against Torture analysis.

Practical Effect: When considering an applicant's eligibility for withholding of removal, Immigration Judges should determine whether an applicant has demonstrated that the applicant's life or freedom would be threatened for "*a reason*" described in INA § 241(b)(3)(A)—race, religion, nationality, membership in a particular social group, or political opinion. That standard is not

the "at least one central reason" standard that applies to asylum claims. Immigration Judges should not cite *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) to analyze withholding of removal claims.

When applying the CAT regulations, immigration judges should consider actions of both public officials (even those not carrying out official duties) as well as persons acting in an official capacity. Immigration judges should also consider the "efficacy" of governmental action against torture, not just their existence.

Case Summary: The panel held that the BIA's nexus standard in withholding of removal cases, established in *Matter of C-T-L-*, 25 I&N Dec. 341 (2010), was not entitled to deference because the INA unambiguously established two different nexus standards. *See* INA § 241(b)(3). The panel explained that Congress, through the REAL ID Act of 2005, Pub. L. No. 109-113, 119 Stat. 231, amended the asylum statute to require that a protected ground was "at least one central reason" for persecuting the applicant, but Congress did not similarly amend the withholding of removal statute. The withholding of removal provision requires only that the alien must show only that his "life or freedom would be threatened for *a reason*" related to a protected ground. The panel reasoned that the use of cross-references in the withholding of removal provision to two clauses of the asylum statute indicated that the "decision to adopt the 'one central reason' standard for asylum but not withholding of removal claims appears to have been the product of a deliberate choice, rather than a mere drafting oversight." The panel noted that "[t]he phrase 'a reason' includes weaker motives than 'one central reason [,]'" but remanded to the Board to decide the case.

The panel also addressed petitioner's Convention Against Torture claim. The panel held that there is no "rogue official" exception to CAT relief and that an applicant need only show that torture was inflicted by a public official *or* by someone who is acting in an official capacity because the regulation "does not require that the public official be carrying out his official duties, so long as he is the actor or knowingly acquiesces in the acts." The panel also noted that the CAT analysis must focus on the efficacy of governmental action and not just their efforts. Finally, the panel reiterated that the petitioner does not bear the burden to show that it is impossible to avoid torture by internally relocating within a country. *See Maldonado v. Lynch*, 786 F.3d 1155, 1163 (9th Cir. 2015) (en banc).

E. *Saldivar v. Sessions*, 877 F.3d 812 (9th Cir. 2017)

Issues: Admission, Cancellation of Removal for Certain Permanent Resident, Continuous Physical Presence

Holding: The phrase "in any status" plainly encompasses every status recognized by immigration statutes, lawful or unlawful. A procedurally regular admission constitutes an admission "in any status" under INA § 240A(a)(2) when an alien presents himself for inspection and is waved through a port of entry.

Practical Effect: A procedurally regular admission, such as being waived across the border by immigration officials, satisfies the "admitted in any status" requirement under INA § 240A(a)(2). As such, when deciding continuous residence for cancellation of removal for certain permanent residents, Immigration Judges must consider evidence or testimony as to whether the noncitizen has been admitted with procedural regularity.

Case Summary: In 1993, Petitioner entered the United States as a ten-year-old child when he was waived across the border by immigration officials. In 2012, he was placed in removal proceeding for his conviction for a controlled substance offense. Petitioner applied for cancellation of removal pursuant to INA § 240A(a)(2). The Immigration Judge found, and the Board affirmed, that Petitioner's procedurally regular admission in 1993 did not constitute an admission "in any status" and that he was therefore statutorily ineligible for cancellation of removal.

In accordance with its precedent and the BIA's consistent interpretation of "admission," the panel reaffirmed that an alien is deemed "admitted" when he presents himself for inspection and is waved through the border. The panel also rejected as facially incorrect the government's argument that "in *any* status" means "in any *lawful* status" because the omission of the word "lawful" from INA § 240A(a)(2), as compared to INA § 240A(a)(1), clearly shows that Congress intended to establish two distinct requirements. In its plain meaning, the term "any" under INA § 240A(a)(2) is all-inclusive and unambiguous. The panel held that because the phrase "in any status" encompasses lawful or unlawful status, Petitioner's procedurally regular admission constitutes an admission in "any status" under INA § 240A(a)(2).

F. *Campos-Hernandez v. Sessions*, 889 F.3d 564 (9th Cir. 2018)

Issues: NACARA, Heighted Physical Presence

Holding: The Ninth Circuit applied *Chevron* deference to *Matter of Castro-Lopez*, 26 I&N Dec. 693 (BIA 2015), where the BIA held the heightened continuous physical presence for COR under NACARA is measured from Respondent's most recently incurred ground of removal rather than his first.

Practical Effect: The heightened ten-year physical presence for NACARA applicants begins from their most recently incurred ground of removal rather than their first.

Case Summary: The panel affirmed the BIA's conclusion that Respondent is ineligible for special rule cancellation of removal ("COR") under the Nicaraguan Adjustment and Central American Relief Act ("NACARA").

To be eligible for COR under NACARA, an alien who is inadmissible on certain criminal grounds, like Respondent, is subject to a heightened ten-year continuous physical presence requirement that starts to run immediately following "the commission of an act, or the assumption of a status, constituting a ground for removal." 8 C.F.R. § 1240.66(c)(2). Here, the Respondent was convicted of drug-related offenses in California in 2003, 2005, and 2008, all of which constitute grounds of removal for COR under NACARA. The IJ determined Respondent was ineligible for NACARA because all of his drug convictions occurred within the previous ten years. In a non-precedential, single-member opinion, the BIA dismissed Respondent's appeal, holding Respondent did not meet the heightened ten-year physical presence requirement because the clock starts running from his 2008 conviction. Respondent timely filed a petition for review, arguing the clock should start running from the time of his first conviction that constitutes a ground of removal rather than his last.

The panel first determined that it is not bound by *Fong v. INS*, 308 F.2d 191 (9th Cir. 1962), where the Ninth Circuit, in interpreting a now-superseded statute that reads identical to the NACARA provision at issue, measured the continuous physical presence from the alien's first act or status that rendered him deportable. But because *Fong* did not hold a contrary interpretation was foreclosed, the panel applied *Chevron* deference to *Matter of Castro-Lopez*, 26 I&N Dec. 693 (BIA

2015), where the BIA held the clock for continuous physical presence starts from the alien's most recently incurred ground of removal rather than his first. *See Matter of Castro-Lopez*, 26 I&N Dec. 693, 696 (BIA 2015).

IV. Adjustment of Status

A. *Eleri v. Sessions*, 852 F.3d 879 (9th Cir. 2017)

Issues: Conditional Permanent Residence, Waiver of Inadmissibility, Aggravated Felony

Holding: Admission of an alien to the United States as a conditional permanent resident constitutes admission "as an alien lawfully admitted for permanent residence" for the purpose of the inadmissibility waiver under INA § 212(h).

Practical Effect: When determining eligibility for a waiver of inadmissibility, the Ninth Circuit makes no distinction between conditional permanent resident and permanent resident status.

Case Summary: Petitioner argued that because he was admitted as a conditional permanent resident, he did not actually obtain permanent resident status, and therefore he is not ineligible for a waiver of inadmissibility under INA § 212(h). The panel rejected Petitioner's argument, holding that an alien admitted as a conditional permanent resident is an "an alien lawfully admitted for permanent residence" for the purpose of the inadmissibility waiver under INA § 212(h). The panel relied on the Third Circuit's decision in *Paek v. Attorney General of the United States*, which determined that the language of the INA indicates that admission on a conditional permanent resident status constitutes lawful admission for permanent residence. 793 F.3d 330, 333 (3d Cir. 2015). Thus, Petitioner's conviction for an aggravated felony makes him ineligible for a waiver of inadmissibility under INA § 212(h).

B. *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017)

Issues: Temporary Protective Status, Admission, Adjustment of Status

Holding: Under INA § 244(f)(4), the Temporary Protected Status statute, an alien afforded TPS is deemed to be in lawful status as a nonimmigrant—and has thereby satisfied the requirements for becoming a nonimmigrant, including inspection and

admission—for purposes of adjustment of status under INA § 245.

Practical Effect: TPS constitutes an "admission" for purposes of adjustment of status.

Case Summary: USCIS erroneously concluded that entry under a grant of TPS did not constitute "inspected and admitted or paroled" as required by INA § 245(a) when it found a TPS beneficiary from El Salvador ineligible to adjust to lawful permanent resident status through marriage to a United States citizen, on the ground that he entered the United States without inspection. The Ninth Circuit concludes that INA § 244(f)(4) unambiguously treats aliens with TPS as being "admitted" for purposes of adjustment status.

C. *Hsiao v. Hazuda*, 869 F.3d 1034 (9th Cir. 2017)

Issues: Adjustment of Status, INA § 245(i), "Approvable When Filed"

Holding: USCIS is not required to reevaluate a visa petition denied on the merits, absent subsequent changed circumstances, and may consider the denial conclusive proof that the visa petition was not meritorious when filed.

Practical Effect: An Immigration Judge is not required to consider new evidence submitted with an adjustment of status application to decide whether a visa petition was "approvable when filed," although the IJ retains discretion to do so. *See Matter of Riero*, 24 I&N Dec. 267 (BIA 2007).

Case Summary: Petitioner entered the United States in 1993 on a student visa and obtained a master's degree in electrical engineering. Petitioner filed a visa application in 1998 as an alien with an advanced degree or exceptional ability; he also sought a "national interest" waiver. *See* INA § 101(b)(2)(B)(i). USCIS denied the petition. In 2000, Petitioner filed a visa petition as an alien of "extraordinary ability." That visa petition was also denied by USCIS. Petitioner filed a third visa petition in 2010, which was approved by USCIS.

Petitioner then sought to adjust status to that of a lawful permanent resident under INA § 245(i), in order to avoid the requirement that he consular process—triggered by his unauthorized employment in the United States. *See* INA § 245(c)(2). To establish eligibility under INA § 245(i),

Petitioner had to establish that a visa petition was "approvable when filed" on or before April 30, 2001. 8 C.F.R. § 245.10(a)(1)(i)(A). Petitioner argued that his 1998 and 2000 visa petitions were "approvable when filed" and he provided new evidence in support of that claim. USCIS concluded that the visa petitions were not "approvable when filed" and denied Petitioner's adjustment of status application under INA §245(i). Petitioner's administrative appeal was denied. A district court granted summary judgment in favor of USCIS in a subsequent challenge under the Administrative Procedure Act.

The panel affirmed the district court's grant of summary judgment. The panel explained that "approvable when filed," *see* 8 C.F.R. § 245.10(a)(3), is a "safety valve for petitions that would have been approved on their merits if they had been adjudicated on the day they were filed but were not approved because of subsequent events." The panel accorded *Auer* deference to USCIS's interpretation of "approvable when filed" and held that USCIS is not required to revisit an original visa determination made on the merits if it did not depend on changed circumstances that arose after the time of filing. Thus, "USCIS was . . . permitted to treat the denials of the petitions as dispositive in determining that they were not meritorious in fact and therefore were not approvable when filed."

Rejecting the Petitioner's arguments, the panel observed that *Matter of Riero*, 24 I&N Dec. 267 (BIA 2007), permits an IJ to exercise discretion to review new evidence, but it does *not* require the IJ to do so for all applicants who seek refuge in the grandfathering provision of INA § 245(i).

V. Motions

A. *Agonafer v. Sessions*, 859 F.3d 1198 (9th Cir. 2017)

Issues: Motions to Reopen, Changed Country Conditions, Convention Against Torture

Holding: It is an abuse of discretion to disregard or fail to consider evidence of changed country conditions.

Practical Effect: To determine whether changed country conditions allow a time and number barred respondent to reopen to apply for asylum or CAT relief, *see* INA § 240(c)(7)(C)(ii), the Court must: (1) compare the evidence submitted with the motion to reopen against that available in the prior proceeding; and, (2) articulate

whether or not the new evidence establishes "qualitatively different" country conditions.

Case Summary: The petitioner feared returning to Ethiopia on account of his sexual orientation. In 2005, an Immigration Judge ("IJ") granted the petitioner a waiver under INA § 212(c), as well as withholding of removal and protection under the Convention Against Torture ("CAT"). DHS appealed and the Board vacated that decision. The IJ reopened the petitioner's case and granted the same relief in a 2007 decision. The Board reversed and the Ninth Circuit dismissed a subsequent petition for review. *See Agonafer v. Holder*, 467 F. App'x 753 (9th Cir. 2012).

The petitioner filed an untimely motion to reopen with the Board in 2013, claiming that changed country conditions in Ethiopia should excuse his untimely motion and allow him to seek deferral of removal under CAT. *See* INA § 240(c)(7)(C)(ii). The Board dismissed the motion. It found that the evidence reflected "ongoing and substantially similar treatment of homosexuals that existed at the time of the respondent's hearing[.]" The petitioner appealed.

After finding that it had jurisdiction, the Ninth Circuit held that the Board abused its discretion "because it clearly disregarded or failed to give credit to the post-2007 evidence," submitted by the petitioner, which established "qualitatively different" country conditions from those presented to the IJ in 2007. Specifically, at least two reports showed evidence "of violence directed against homosexuals in Ethiopia since 2007." The panel concluded that the country conditions evidence was sufficient to establish the petitioner's prima facie eligibility for deferral of removal under CAT.

B. *Sanchez v. Sessions*, 870 F.3d 901 (9th Cir. 2017)

Issues: Suppression, Fourth Amendment, Regulatory Violations, Motions to Terminate

Holding: Proceedings must be terminated because the government egregiously violated the petitioner's Fourth Amendment rights and an immigration regulation, 8 C.F.R. § 287.8(b)(2), intended to protect respondents. Evidence obtained due to an egregious violation of the Fourth Amendment must be suppressed.

Practical Effect: An Immigration Judge must terminate removal proceedings if a respondent establishes an egregious Fourth Amendment

violation related to their seizure by immigration officers because there was necessarily a prejudicial violation of 8 C.F.R. § 287.8(b)(2), which requires reasonable suspicion before detention.

Case Summary: Petitioner entered the United States without inspection in 1988. Petitioner applied for and received Family Unity Benefits and Employment Authorization in 2004; Petitioner's application to renew benefits was denied in 2009. In 2010, Petitioner piloted a small boat with two Latino friends and one of their sons out of Port Hueneme, California. Petitioner's engine failed and he called for assistance. The Coast Guard subsequently towed his boat to a harbor on the Channel Islands. There, ten Coast Guard officers asked for: (1) Petitioner's name; and (2) the location where Petitioner lived. The Coast Guard officers also frisked Petitioner and asked for identification—which returned no information when checked against law enforcement databases. The Coast Guard officers called Customs and Border Protection officers, who arrived two hours later and transported Petitioner to a CBP facility. There, CBP officers elicited Petitioner's nationality and mode of entry into the United States. Petitioner's detention was recorded in a Form I-213, Record of Deportable/Inadmissible Alien, which recorded the Coast Guard officers' belief that the men were possibly "4 undocumented worker aliens."

During removal proceedings, Petitioner denied the charge of removability and sought to suppress the government's evidence of alienage—the Form I-213 and Family Unity Benefit application—and terminate proceedings. The IJ denied the motion to suppress and terminate. The Board affirmed.

The panel granted the petition for review and held that the "Government violated a regulation meant to benefit [Petitioner], and because he was prejudiced by that violation, [Petitioner's] removal proceedings must be terminated." First, the panel explained that the Coast Guard's seizure did not fit within the border search doctrine because Petitioner never left the territorial waters of the United States and was not at a port of entry. Second, the panel found that Petitioner established a *prima facie* Fourth Amendment violation because, under a totality of the circumstances, the evidence indicated that "officers seized and detained [Petitioner] based on his Latino ethnicity alone."

The panel found that the violation was egregious because Coast Guard officers should have known that they were violating the Fourth Amendment in light of clearly established case law, *Brignoni-Ponce*, 422 U.S. 873, 886 (1975), which held that detention based solely on a person's race or ethnicity is unconstitutional. After finding that 8 C.F.R. § 287.8(b)(2), a regulation that permits brief detentions based on "a reasonable suspicion, based on specific articulable facts, that the person being questioned . . . engaged in an offense against the United States or is an alien illegally in the United States," applied to the Coast Guard officers, *see* 14 U.S.C. § 89(b), the panel held that: (1) the regulation "was meant to preserve [Petitioner's] privacy and protect him from racial profiling; and (2) the regulatory violation was presumed to prejudice [Petitioner] because it was required by the Fourth Amendment. The panel concluded that, "[b]ecause the Government violated a regulation meant to benefit [Petitioner], and because he was prejudiced by that violation, [Petitioner's] removal proceedings must be terminated." *See Matter of Garcia-Flores*, 17 I&N Dec. 325, 328–29 (BIA 1980).

The panel terminated proceedings without deciding whether the exclusionary rule applied to Petitioner's applications for Family Unity Benefits and Employment Authorization, which predated Petitioner's seizure by the Coast Guard.

C. *Arazola-Galea v. United States*, 876 F.3d 1257 (9th Cir. 2017)

Issues: Categorical Approach, Re-Entry of a Previously Removed Alien

Holding: The Supreme Court's decision in *Mathis v. United States*, 136. S. Ct. 2243 (2016), clarified the application of the categorical approach, but it did not establish a new rule of constitutional law.

Practical Effect: The holding in *Mathis* cannot be retroactively applied to invalidate sentencing enhancements.

Case Summary: Petitioner filed a motion for authorization to file a second habeas petition, arguing that under *Mathis v. United States,* 136 S. Ct 2243 (2016), the sentence enhancement applied to his Colorado conviction was improper because his statute of conviction was broader than the generic federal drug trafficking offense in U.S.S.G. §2L1.2(a) and (b). He also asserted that *Mathis* "articulated a new constitutional rule that retroactively

invalidates the sentencing enhancement applied on the basis of his Colorado conviction."

Relying on precedent from other circuits, the panel denied the motion finding that "*Mathis* does not establish a new rule of constitutional law; rather, it clarifies application of the 'categorical' analysis to the Armed Career Criminal Act (ACCA)."

D. *Miller v. Sessions*, — F.3d —, 2018 WL 2107269 (9th Cir. May 8, 2018)

Issues: INA §§ 240(b)(5), 241(a)(5)

Holding: INA § 241(a)(5) does not deprive an immigration court of jurisdiction to entertain a motion to reopen an *in absentia* removal order under INA § 240(b)(5)(C)(ii).

Practical Effect: INA § 241(a)(5) does not bar Immigration Judges from resolving a motion to reopen an *in absentia* removal order, where the motion is based on a claim of lack of notice of the individual's removal hearing.

Case Summary: Applying *Morales-Izquierdo v. Gonzales*, 486. F.3d 484, 496 (9th Cir. 2007) (en banc), the panel finds that the BIA erred by holding that INA § 241(a)(5) deprived an immigration court of jurisdiction to resolve a motion to reopen an *in absentia* removal order pursuant to INA § 240(b)(5)(C)(ii) since it would violate due process.

VI. Bond

A. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017)

Issues: Juvenile Detention, Bond Hearings, Unaccompanied Minors

Holding: Paragraph 24A of the *Flores* Settlement, which affords detained minors bond redetermination hearings before an immigration judge, is not terminated with respect to unaccompanied minors by the Homeland Security Act ("HSA") or Trafficking Victims Protection Reauthorization Act ("TVPRA").

Practical Effect: Unaccompanied minors in ORR custody must be provided bond redetermination hearings before IJs pursuant to the *Flores* Settlement. These bond hearings are unique; although an IJ may determine that the manner of detention is improper, the hearing

does not result in a bond amount being set nor entitle minors to release.

Case Summary: In 1997, plaintiffs and the government entered into a settlement agreement ("Settlement") which "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS." Paragraph 24A provides that a "minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge." Congress then passed the HSA in 2002 and the TVPRA in 2008; the HSA transferred INS's authority to ORR. After the district court granted Plaintiffs' motion to enforce the Settlement in full the government appealed, arguing that the 2002 and 2008 laws terminated Paragraph 24A with respect to unaccompanied minors. The Ninth Circuit panel held that neither law explicitly terminated the bond hearing requirement for unaccompanied minors, that the statutes allowed room for IJs to conduct such hearings, and that holding the hearings aligned with Congress's intent in passing the HSA and TVPRA. It therefore affirmed the decision of the district court.

The TVPRA requires ORR to place children in its custody in the least restrictive setting and that children may not be placed in secure facilities without a determination that the child poses a danger to self or others or has been charged with a criminal offense. The panel stated that this determination can appropriately be made in a bond hearing before an IJ. The panel held that that requiring such hearings in compliance with Paragraph 24A was not impermissible in light of the HSA and TVPRA because neither explicitly eliminates Paragraph 24A nor grants ORR exclusive control over assisting unaccompanied minors in immigration proceedings. Therefore, the panel reasoned that Congress did not intend to remove all agencies other than ORR from involvement with unaccompanied minors. The panel also addressed the government's argument that the HSA and TVPRA do not allow for bond hearings for unaccompanied minors, explaining that there is no irreconcilable tension between the IJ's determination and ORR's separate determination regarding the child's placement.

Despite the government's argument that providing bond hearings would provide minimal benefit, the panel stated that Paragraph 24A is part of the parties' bargain and cited several benefits of bond hearings compared to the detention review process under ORR's current policy, including rights to representation by counsel, to appeal, and to make an oral statement. The panel also noted that its reading aligned with

congressional intent, noting that the HSA and TVPRA both aimed at improving, not reducing protections for unaccompanied minors.

B. *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017)

Issues: Bond Determinations; Ability to Pay

Holding: When making bond determinations, immigration officials are required to consider (1) the financial ability to obtain bond and (2) alternative conditions of release, among other factors.

Practical Effect: An IJ must explicitly consider the financial circumstances and alternative release conditions in their bond determination for aliens detained under INA § 236(a) in the Central District of California.

Case Summary: Plaintiffs are a class of non-citizens detained under INA § 236(a) in removal proceedings in the Central District of California who have been found to be neither dangerous nor enough of a flight risk to require detention without bond but who remained detained because they were unable to afford bond in the amount set by immigration officials or an Immigration Judge. The district court granted Plaintiff's motion for a preliminary injunction requiring immigration officials and immigration judges to consider (1) the financial ability to obtain bond and (2) alternative conditions of release when setting bond.

The panel found no error in the district court's grant of a preliminary injunction and found that Plaintiffs are likely to succeed on the merits of their claim under the Due Process Clause. The panel noted that a bond determination process that does not include consideration of financial circumstances and alternative release conditions undermines the connection between the bond and the legitimate purpose of ensuring the non-citizen's presence at future hearings.

C. *Saravia v. Sessions*, No. 17-cv-03615-VC (N.D. Cal. Nov. 20, 2017)

Issues: Bond Hearings, Unaccompanied Minors

Holding: Unaccompanied minors who have been released to a sponsor by ORR and rearrested on allegations of gang affiliation are entitled to a bond hearing within seven days of arrest. In the bond hearing, an immigration judge must determine whether changed

circumstances warrant a finding that the minor is now a danger to the community.

Case Summary: An unaccompanied minor filed a petition for habeas corpus with the District Court of Northern California, which issued a preliminary injunction requiring the government to hold bond hearings for unaccompanied minors who have been released by ORR to a sponsor but were subsequently rearrested. The court certified the class as:

(1) Noncitizens who came to the country as an unaccompanied minor,
(2) Who were previously detained in ORR custody and then released by ORR to a sponsor, and
(3) Who have been or will be rearrested by DHS on the basis of a removability warrant on or after April 1, 2017, on allegations of gang affiliation.

Under the preliminary injunction, class members are entitled to a bond hearing before an immigration judge, within seven days of arrest, to challenge the basis of allegations of gang affiliation. *See Saravia* at *44. The minor's sponsor must receive notice and be given an opportunity to participate in the hearing.

At the hearing, DHS must present evidence that the minor is a danger to the community, notwithstanding ORR's prior determination that the minor was not a danger. If the immigration judge decides that the government has not made an adequate showing of changed circumstances such that the minor is a danger to the community, or decides that the minor has successfully rebutted the showing of changed circumstances, the minor must be released into the custody of the previous sponsor.

VII. Criminal Removability Issues

A. Crimes Involving Moral Turpitude

1. *Ortega-Lopez v. Lynch*, 834 F.3d 1015 (9th Cir. 2016)

Issues: Crimes Involving Moral Turpitude

Holding: The Ninth Circuit remanded *Matter of Ortega-Lopez*, 26 I&N Dec. 99 (BIA 2013), for the BIA to consider whether cockfighting involves a "protected class of victim" such that it qualifies as a CIMT.

Practical Effect: The best practice for determining whether a crime is a CIMT is to consider whether "grave acts of baseness or depravity" involve "intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim."

Case Summary: The BIA affirmed the IJ's finding that a conviction for participating in cockfighting in violation of the Unlawful Animal Venture Prohibition, 7 U.S.C. § 2156(a)(1), is a categorical crime involving moral turpitude ("CIMT").

On appeal, the Ninth Circuit noted that CIMTs fall into two distinct categories: those involving fraud or those involving grave acts of baseness or depravity. While acknowledging that the Board is not required to apply *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010), the Court reiterated the language in *Nunez* that non-fraudulent CIMTs "almost always involve an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim." Because harm to chickens appears to fall outside the normal scope of a CIMT, the Court remanded for the Board to consider the language in *Nunez* as it may apply to the petitioner's conviction. Finally, the Court stated that conduct does not automatically qualify as a CIMT simply because it is outlawed in all 50 states.

Judge Bea wrote separately, concurring with the panel and emphasizing the unsuitability of the *Taylor v. United States*, 495 U.S. 575 (1990), for determining whether a particular crime is a CIMT.

2. *Escobar v. Lynch*, 846 F.3d 1019 (9th Cir. 2017)

Issues: Categorical Approach, Crimes Involving Moral Turpitude

Holding: A conviction for witness tampering under CPC § 136.1(a) is not categorically a crime involving moral turpitude.

Practical Effects: CPC § 136.1(a) is not categorically a CIMT, although the Ninth Circuit left open the issues of divisibility and the modified categorical approach.

Case Summaries: Duran is a native and citizen of El Salvador who applied for Cancellation of Removal for Certain Nonpermanent Residents based on prospective hardship to her United States citizen son.

The IJ found Duran statutorily barred from Cancellation of Removal on the grounds that her 2001 California conviction for witness tampering constituted a CIMT. The IJ reasoned that "malice" is explicitly listed as an element of the conviction under CPC § 136.1(a), and that therefore a conviction under that section is categorically a CIMT.

The Board dismissed the appeal in an unpublished disposition. The Board employed the definition of a CIMT as stated in *Matter of Serna*, 20 I&N Dec. 579, 582 (BIA 1992), and cited the same decision in determining that a CIMT need not involve actual or threatened harm. The Ninth Circuit granted the petition and remanded for further proceedings.

The panel first determined that the Board decision was not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the Board has not issued a published decision in this matter. Rather, the Ninth Circuit evaluated the persuasive value of Board's reasoning according to the factors in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, the panel found the Board's reasoning unpersuasive and reviewed the matter *de novo*. First, the Ninth Circuit disapproved of the Board's use of the CIMT definition from *Matter of Serna*, because a different definition has already been adopted within the Ninth Circuit. Instead, the Ninth Circuit and other Board cases have generally organized CIMTs into two types: those involving fraud, and those involving grave acts of baseness or depravity. The panel further explained that "[n]on-fraudulent CIMTs will almost always involve an intent to injure someone, an actual injury, or a protected class of victims."

Applying this definition of a CIMT, the Ninth Circuit found that CPC § 136.1(a) is not a crime involving fraud, nor a crime involving intended or actual injury. The Ninth Circuit referred to the facts of the California criminal case *People v. Wahidi*, 166 Cal. Rptr. 3d 416, 418–19 (Cal. Ct. App. 2013), to demonstrate that the "malice" required to convict under § 136.1(a) falls short of the intent to harm required for a non-fraudulent CIMT. The panel also noted that § 136.1(a) is not an implicit crime of fraud because there is no requirement that the defendant intend to obtain anything of value beyond general interference with the orderly administration of justice. Because § 136.1(a) does not involve fraud and lacks the requisite intent, the Ninth Circuit determined that it is not a categorical CIMT. The Ninth Circuit

declined to reach the legal issues of divisibility and the modified categorical approach.

3. *Ramirez-Contreras v. Sessions*, 858 F.3d 1298 (9th Cir. 2017)

Issues: Crime Involving Moral Turpitude, Categorical Approach

Holding: Petitioner's conviction for fleeing from a police officer under California Vehicle Code ("CVC") § 2800.2 is not a crime of moral turpitude because § 2800.2 is indivisible and contains a provision that does not necessarily create the risk of harm that characterizes a crime of moral turpitude.

Practical Effects: CVC § 2800.2 is indivisible and the least of its criminalized acts does not constitute a CIMT, therefore, no conviction under CVC § 2800.2 is a CIMT.

Case Summary: Petitioner is a citizen of Mexico who sought cancellation of removal, arguing that his conviction under § 2800.2 was not a CIMT. The Immigration Judge held that Petitioner's CVC § 2800.2 conviction was categorically a CIMT that barred him from cancellation of removal, and the BIA affirmed, relying on its earlier decision, *Matter of Ruiz-Lopez,* 25 I&N Dec. 551 (BIA 2011).

The panel held that CVC § 2800.2, which criminalizes flight from a police officer, is not categorically a CIMT because it defines "willful or wanton disregard" in CVC § 2800.2(b) as including "three or more violations that are assigned a traffic violation point count under Section 12810." The panel noted that the listed traffic offenses were minor and that the California statute differs markedly from the Washington statute in *Matter of Ruiz-Lopez* and from other state police-flight statutes which "penalize[] willful conduct that increased the risk of harm to others." CVC § 2800.2, in contrast, "allows for a finding of 'willful or wonton disregard' even where the perpetrator did not flee in an especially dangerous manner." Thus, a conviction under CVC § 2800.2 could be obtained "on the basis of eluding police while committing three traffic violations that cannot be characterized as 'vile or depraved.'" Comparing the least criminalized conduct under the elements of CVC § 2800.2 to other Ninth Circuit cases analyzing CIMTs, *see Ramirez-Contreras* at *14, the panel concluded that CVC § 2800 is a serious offense but not a CIMT.

Applying the categorically approach, the panel also noted that CVC § 2800.2 is indivisible.

4. *Lozano-Arredondo v. Sessions*, 866 F.3d 1082 (9th Cir. 2017)

Issues: Categorical Approach, Crimes Involving Moral Turpitude, Cancellation of Removal, *Chevron*

Holding: Idaho's petit theft statute is overbroad under the categorical approach and the modified categorical approach must be applied to determine whether Lozano-Arredondo was convicted of a crime involving moral turpitude ("CIMT"). The BIA erred in its interpretation of "offense under" 8 U.S.C. § 1227(a)(2) in *Cortez Canales*.

Practical Effect: Idaho's petit theft statute is overbroad and not a CIMT under the categorical approach but may be under the modified categorical approach. The BIA's interpretation of 8 U.S.C. § 1229b(b)(1)(C) in *Cortez Canales* no longer controls in determining whether the within-five-years element of 8 U.S.C. § 1227(a)(2)(A)(i) applies in the cancellation of removal context.

Case Summary: The Board dismissed petitioner's appeal on alternative grounds, concluding that the petit theft conviction made Lozano-Arredondo ineligible for cancellation of removal because it was an "offense under" INA § 237(a)(2)(A)(i), "a crime involving moral turpitude committed within five years . . . after the date of admission . . . for which a sentence of one year or longer may be imposed." The Ninth Circuit granted Lozano-Arredondo's petition for review and remanded for the BIA to clarify the statutory basis for the dismissal. On remand, the Board, citing *Matter of Cortez Canales*, 25 I&N Dec. 301 (BIA 2010), found that petitioner's petit theft conviction was a CIMT because the statute's "within-five-years" element does not apply in the cancellation of removal context. The Ninth Circuit granted a second petition for review and remanded for further proceedings.

First, the panel addressed whether petitioner's conviction under Idaho's petit theft statute qualifies as a CIMT. The record of conviction did not identify which statutory subsection formed the basis of petitioner's conviction, and the panel held that the section of the Idaho Code that defines the specific acts that constitute theft in Idaho is overbroad and does not qualify as a CIMT under the categorical approach. Next, the panel found

that there is insufficient evidence in the record to determine whether petitioner's conviction is a CIMT under the modified categorical approach: the only criminal conviction document in the record, a rap sheet, did not contain pertinent information about the basis of petitioner's conviction.

The panel noted that it is unclear whether the Supreme Court's decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678, which suggests that an inconclusive record works to a petitioner's advantage, abrogated *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012), which held that where the record of conviction is inconclusive, the petitioner has not met his burden. However, the panel chose not to resolve this issue and remanded the modified categorical approach analysis to the BIA to await the Ninth Circuit's pending decision in *Marinelarena v. Sessions* concerning burden rules.

Second, the panel declined to extend *Chevron* deference to the BIA's interpretation of INA § 240(b)(1)(C), which makes an applicant ineligible for cancellation of removal if, among other things, he committed a CIMT under INA § 237(a)(2). In *Cortez Canales*, the BIA found that INA § 240A(b)(1)(C) was clear under *Chevron* step-one and that it did not incorporate the "within-five-years" element of INA § 237(a)(2)(A)(i). Relying on that decision, the BIA found that Lozano-Arredondo's conviction rendered him statutorily ineligible for cancellation of removal even though it was undisputed that it occurred outside the five-year window of INA § 237(a)(2)(A)(i). The panel determined that the statutory language in INA § 240A(b)(1)(C) is ambiguous, that the legislative history indicates that Congress understood the statute to incorporate all elements of the deportable offenses under INA § 237(a)(2), and that the BIA did not exercise its "expertise and discretion in interpreting the statute" at *Chevron* step-two. Accordingly, the panel remanded to the Board to reconsider its interpretation of the phrase "offense under" in the cancellation of removal statute.

5. *Conejo-Bravo v. Sessions*, 875 F.3d 890 (9th Cir. 2017)

Issues: Crimes Involving Moral Turpitude, Modified Categorical Approach

Holding: A felony hit and run conviction causing injury under California Vehicle Code ("CVC") § 20001(a) is a crime involving moral turpitude.

Practical Effect: Reaffirmation that CVC § 20001(a) is divisible into several crimes, some of which may involve moral turpitude and some that may not. *Cerezo v. Mukasey*, 512 F.3d 1163, 1169 (9th Cir. 2008). Under the modified approach, a felony hit and run that causes injury is a crime involving moral turpitude.

Case Summary: The panel found that the Immigration Judge and the Board correctly looked to Petitioner's plea agreement to conclude that he was convicted of traditional hit and run under CVC § 20001(a). *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). The panel reaffirmed that while CVC § 20001(a) is not categorically a crime involving moral turpitude, it is divisible into several crimes that may be. *Cerezo*, 512 F.3d at 1168–69; *United States v. Martinez-Lopez*, 864 F.3d 1034, 1039 (9th Cir. 2017). Applying the modified categorical approach, the panel found that the traditional hit and run causing injury qualifies as a crime involving moral turpitude under current precedent. *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1213 (9th Cir. 2013) (holding that "non-fraudulent crimes of moral turpitude generally involve an intent to injure, actual injury, or a protected class of victims."). The panel denied the petition for review.

6. *United States v. Molinar*, 881 F.3d 1064 (9th Cir. 2017)

Issues: Categorical Analysis, Crime of Violence

Holding: An attempted armed robbery conviction under Arizona Revised Statutes ("Ariz. Rev. Stat.") § 13-1904 constitutes a crime of violence.

Practical Effect: The Ninth Circuit's decision in *United States v. Taylor*, 529 F.3d 1232 (9th Cir. 2008), that attempted armed robbery under Ariz. Rev. Stat. § 13-1904 is a crime of violence under Section 4B1.2's force clause is no longer good law; however, citing to *United States v. Barragan*, 871 F.3d 689 (9th Cir. 2017), the panel held that attempted armed robbery under Ariz. Rev. Stat. § 13-1904 is still a crime of violence under 4B1.2's enumerated felonies clause.

Case Summary: Applying the categorical approach described in *United States v. Strickland*, 860 F.3d 1224, 1225 (9th Cir. 2017), the panel held that attempted armed robbery under Ariz. Rev. Stat. § 13-1904 is a crime of violence. The panel conceded *Taylor*'s determination that attempted armed robbery in Arizona is a crime of violence under Section 4B1.2's force clause is no longer good law, explaining that it failed to survive *Johnson*'s

definition of force. Thus, an attempted armed robbery conviction in Arizona can no longer be considered a categorical crime of violence under Section 4B1.2's force clause. However, citing to *United States v. Barragan*, 871 F.3d 689 (9th Cir. 2017), the panel concluded that Arizona armed robbery is a categorical match to generic robbery and that Arizona attempt is equivalent to generic attempt. Thus, an attempted armed robbery conviction under Ariz. Rev. Stat. § 13-1904 does constitute a crime of violence for the purpose of sentence enhancement under Section 4B1.2's enumerated felonies clause.

7. *Garcia-Martinez v. Sessions*, 886 F.3d 1291 (9th Cir. 2018)

Issues: Categorical Approach, Crimes Involving Moral Turpitude, Retroactivity, Theft

Holding: Theft convictions under Oregon Revised Statutes ("ORS") §§ 164.045 and 164.043 do not retroactively constitute CIMTs under *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016).

Practical Effect: When an indivisible statute of conviction does not require a permanent taking of property for a theft conviction, the crime is not a CIMT if, at the time of conviction, CIMT theft required an intent to permanently deprive an owner of property.

Case Summary: The panel found the BIA erred in concluding the petitioner's theft convictions were CIMTs. The petitioner, a lawful permanent resident, claimed his theft convictions were not CIMTs that made him removable under INA § 237(a)(2)(A)(ii). At the time the petitioner committed the theft offenses, the indivisible criminal statutes, ORS §§ 164.045, 164.043, were not CIMTs because they did not require a permanent taking of property. Accordingly, the panel found, and the government agreed, that at the time the petitioner committed the theft offenses, they were not CIMTs.

However, the government argued that *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 849 (BIA 2016), applies retroactively and that a theft offense is a CIMT if it involves an intent to permanently deprive an owner of his property or under circumstances where the owner's property rights are substantially eroded. Disagreeing, the panel found that the balance of the retroactivity factors weighed in favor of the petitioner and that the new rule in *Diaz-Lizarraga* should not be applied retroactively to the petitioner.

B. Expungement

1. *Reyes v. Lynch*, 834 F.3d 1104 (9th Cir. 2016)

Issues: Formal Judgement, State Expungement, Controlled Substances

Holding: The Ninth Circuit held that an expunged state conviction remains a conviction under INA § 101 (a)(48). Further, a term of probation constitutes a "conviction" where the immigrant is found guilty or pleads nolo contendere and some form of punishment, penalty, or restraint on liberty is imposed.

Practical Effect: IJs should closely examine an alien's record of conviction to determine if any "punishment, penalty, or restraint on liberty" was imposed as a condition of probation. If probation could be revoked because of the violation of a condition, then the term is likely a "punishment, penalty, or restraint on liberty."

Case Summary: Petitioner pleaded nolo contendere to one count of driving under the influence of a controlled substance in violation of California Health and Safety Code ("CHSC") § 11550(a). His sentence was later expunged under Cal. Penal Code § 1210.1 which deems the "arrest and conviction" to have never occurred if a defendant completes drug treatment and probation successfully. The IJ and BIA held that the Petitioner's conviction was for a controlled substance law under INA § 212(a)(2)(A)(i)(II), despite the expungement, rendering him ineligible for cancellation of removal. Although Petitioner's judgment suspended the imposition of his sentence, Petitioner was fined and placed on 36 months of probation.

The panel held that a state conviction expunged under state law still constitutes a "conviction" under the INA. The panel clarified that a term of probation satisfies the "conviction" requirement of INA § 101(a)(48)(A) as long as: (1) the alien entered a plea of guilty or nolo contendere or has admitted facts sufficient to warrant a finding of guilty, and (2) "the [state] judge has ordered some form of punishment, penalty, or restraint on the alien's liberty." In this case, the Petitioner's "punishment, penalty, or restraint on liberty" included: a fine, submitting to anti-narcotic tests, attending Alcoholics Anonymous meetings, not associating with drug users, and not owning weapons. The panel also noted that the "federal definition of conviction is satisfied regardless of the rehabilitative purpose of probation[.]" As a result, Petitioner's expunged state conviction remains a

conviction for federal immigration purposes and renders him ineligible for adjustment of status and cancellation of removal.

C. Bars to Relief

1. *Budiono v. Lynch*, 837 F.3d 1041 (9th Cir. 2016)

Issues: One-Year Bar, Terrorism Bar, Burden of Proof

Holding: The government must make a threshold showing of particularized evidence for each element of the terrorist bar before the burden shifts to the respondent to rebut it.

Practical Effect: Under this framework, generalized evidence, such as the government's assertion that an individual was involved with a radical political or religious group, is not enough to shift the burden to the respondent. The government must submit particularized evidence to establish each element of a bar to asylum or withholding of removal before the respondent is burdened with rebutting evidence of the bar.

Case Summary: The respondent joined Jemaah Muslim Attaqwa ("JMA") in Jakarta in 1990. In 2000, the respondent fled to the United States after being harmed by JMA and the police when he refused to use force in fundraising efforts and quit the organization. He applied for asylum in 2003, following the murder of a friend in Indonesia by radical Muslims. The IJ initially found that the respondent's application was time-barred, that he had not established past persecution or credible fear to qualify for withholding of removal, and that he was ineligible for withholding of removal because he had contributed material support to the JMA, which the IJ found to be a terrorist organization. The Board found past persecution had been established and remanded for further fact-finding on whether the respondent could internally relocate and with regard to whether the JMA was a terrorist organization. At the second hearing the IJ concluded that the respondent would be eligible for withholding of removal but for the terrorism bar and again concluded he contributed material support to a terrorist organization; the Board affirmed.

The Ninth Circuit agreed with the IJ that the murder of the respondent's friend did not constitute a changed circumstance as to excuse his late asylum filing because the murder resulted from the same conditions which drove the respondent to flee three years earlier: radicalized Islam. However, the Court disagreed

that the terrorism bar applied to respondent's request for withholding of removal. The Court looked to the burden shifting language in the regulations and applied the same burden-of-proof framework used in the persecutor bar. The Court held that the government is required to make a threshold showing of particularized evidence to establish each of the bar's elements before the burden shifts to the respondent to rebut it. In the case of material support for terrorism, the record must contain some evidence that "[1] the alleged terrorist group consisted of two or more people, [2] who engaged in one of six enumerated 'terrorist activities,' and [3] that the applicant for relief actually knew of this activity when he provided material support to the group." The Court concluded that no evidence in the record supports the conclusion that the JMA is a terrorist organization, and therefore the bar does not apply. Because the Board had twice considered the case and failed to make an adequate finding that the bar applied, the panel concluded that remand was not appropriate and that the respondent was eligible for withholding of removal.

D. Aggravated Felonies & Controlled Substances Offenses

1. *Sandoval v. Sessions*, 866 F.3d 986 (9th Cir. 2017)

Issues: Categorical Approach, Aggravated Felonies

Holding: A conviction for delivery a of a controlled substance under ORS § 475.992(1)(a) is not categorically an aggravated felony under INA § 101(a)(43)(B).

Practical Effect: ORS § 475.992(1)(a) is not categorically an aggravated felony because the definition of "delivery" under Oregon law is overbroad and indivisible. The Ninth Circuit's decision in *United States v. Chavaria-Angel*, 323 F.3d 1172, 1177-78 (9th Cir. 2003) no longer controls in determining whether ORS § 475.992(1)(a) is an aggravated felony under the modified categorical approach.

Case Summary: The IJ rejected Sandoval's argument that Oregon's statute is broader than a federal controlled substance offense because the Oregon statute punishes solicitation to deliver in addition to actual and attempted delivery.

The Board dismissed the appeal in an unpublished decision. The Board explained that solicitation qualified as "attempted delivery" under Oregon law and "attempted delivery" of a

controlled substance is punishable as a felony under the Controlled Substances Act ("CSA"). The Board thus concluded that Sandoval's conviction under ORS § 475.992(1)(a) was categorically an aggravated felony under INA § 101(a)(43)(B) because it punished "attempted delivery."

The Ninth Circuit granted the petition and remanded for further proceedings. The panel first determined that the Board decision was not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because it does not defer to an agency's interpretation of state law or provisions of the federal criminal code. The panel then analyzed the statute under the categorical approach. First, the Ninth Circuit explained that an "aggravated felony" under INA § 101(a)(43)(B) includes 1) "illicit trafficking" in a controlled substance, requiring "some sort of commercial dealing," and 2) any "drug trafficking crime" defined in the CSA. The Ninth Circuit stated without discussion that delivery of a controlled substance under ORS § 475.992(1)(a) was not a categorical match to an "illicit trafficking" offense.

To determine whether delivery of a controlled substance is a "drug trafficking crime," the panel explained that it must consider the meaning of "distribute." Analyzing the definitions of "distribute" and "deliver" in the CSA, the Ninth Circuit stated that one may commit a drug trafficking crime by "actually delivering, attempting to deliver, or possessing with intent to deliver" a controlled substance. The panel then reviewed case law to find that the generic definition of "attempted delivery" under federal law does not include solicitation.

Next, the Ninth Circuit analyzed the definition of the term "deliver" in the Oregon statute, which means "the actual, constructive, or attempted transfer" of a controlled substance. The panel further explained that, under Oregon law, the definition of "attempt" encompasses solicitation. The panel referred to the facts of the Oregon criminal case *State v. Self*, 706 P.2d 975 (Or. Ct. App. 1985), to demonstrate that mere solicitation to deliver supports a conviction for delivery of controlled substances under ORS § 475.992(1)(a). Because offering to sell a controlled substance, without possession, is an "attempt" under Oregon law but not under federal law, the Ninth Circuit determined, citing *United States v. Rivera-Sanchez*, 247 F.3d 905, 908-09 (9th Cir. 2001) (en banc), that ORS § 475.992(1)(a) is not an aggravated felony under the categorical approach.

The Ninth Circuit further found that the modified categorical approach did not apply to this analysis because Oregon law is indivisible with respect to whether an "attempt" is accomplished by solicitation. In doing so, the panel declined to follow a prior Ninth Circuit decision in *United States v. Chavaria-Angel*, 323 F.3d 1172, 1177-78 (9th Cir. 2003), which held that ORS § 475.992(1)(a) could qualify as an aggravated felony under the modified categorical approach. The panel explained that the decision in *Chavaria-Angel* rested on a method rejected in *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013), and the opinion did not consider whether a jury must unanimously choose between alternative methods of delivery, including solicitation. Therefore, the Ninth Circuit held that *Chavaria-Angel* did not control in this case.

2. *United States v. Arriaga-Pinon*, 852 F.3d 1195 (9th Cir. 2017)

Issues: Categorical Approach, Aggravated Felony

Holding: CVC § 10851(a) is not categorically an aggravated felony theft offense under INA § 101(a)(43)(G). Additionally, the conviction documents in the petitioner's case did not establish that his conviction qualified as a theft offense under the modified categorical approach.

Practical Effect: The panel confirmed that CVC § 10851(a) is categorically overbroad as to the generic theft offense, under the first step of the categorical analysis. A concurrence by the Chief Judge explains that the divisibility analysis in *Duenas-Alvarez v. Holder*, 733 F.3d 812 (9th Cir. 2013) may no longer be correct in light of *Mathis v. U.S.*, 136 S. Ct. 2243 (2016).

Case Summary: In the context of criminal sentencing for illegal reentry, the District Court held that Arriaga-Pinon's conviction for California Vehicle Code ("CVC") section 10851(a) constituted an aggravated felony theft offense. Arriaga-Pinon appealed, arguing that the statute is not divisible in light of *Mathis* and that his own conviction documents did not unambiguously show that he was convicted of an aggravated felony theft offense.

Under the first step of the categorical approach, the panel confirmed the holding in *U.S. v. Vidal*, 504 F.3d 1072, 1075 (9th Cir. 2007), that CVC § 10851(a) does not satisfy the elements of a generic theft offense. It reemphasized that section 10851(a) does not match the generic theft offense because it applies to

accessories after the fact, in addition to principals and accomplices. *See id.* at 1079-80 ("Because one need only have assisted the offender with knowledge that the offense has *already been committed* in order to incur accessory-after-the-fact liability, one who is convicted as an accessory after the fact to theft cannot be said to have committed all the elements of generic theft.") (emphasis in original) (internal citations omitted).

Citing *Duenas-Alvarez v. Holder*, 733 F.3d 812 (9th Cir. 2013), the panel then assumed that CVC § 10851(a) is divisible under step two. In doing so, it declined to address the issue of whether this determination is still correct in light of intervening Supreme Court precedent in *Mathis v. U.S.*, 136 S. Ct. 2243 (2016).

Finally, the Ninth Circuit conducted the modified categorical approach under step three and looked at the records of conviction. After reviewing the felony complaint, written plea, and plea colloquy, it held that "the record does not establish [] whether [Arriaga] was convicted as a principal or as an accessory after the fact." Therefore, the panel found that "the judicially noticeable documents are not sufficient to show that Arriaga was convicted of an aggravated felony."

3. *Diego v. Sessions*, 857 F.3d 1005 (9th Cir. 2017)

Issues: Aggravated Felony, Sexual Abuse of a Minor, Categorical Analysis

Holding: Petitioner's conviction for attempted sexual abuse under Oregon Revised Statutes ("ORS") § 163.427 is a sexual abuse of a minor aggravated felony under INA § 101(a)(43)(A), because Petitioner was convicted under paragraph (1)(a)(A) of the Oregon statute—a portion of the statute that is divisible.

Practical Effects: (1) ORS § 163.427 lists several divisible offenses, (2) ORS § 163.247(1)(a)(A) is categorically a sexual abuse of a minor aggravated felony under INA § 101(a)(43)(A), and (3) courts conducting a divisibility analysis should first look to the statutory text, and then proceed to examine the *Shepard* documents and state or federal case law for clues to the divisibility of a criminal statute.

Case Summary: The panel performed a categorical analysis of ORS § 163.427 to determine whether it was an aggravated felony crime of sexual abuse of a minor. The Oregon statute is overbroad as compared

to the generic definition of sexual abuse of a minor because some of the statute's paragraphs punish crimes against adults.

The panel then proceeded to analyze whether ORS § 163.427 is divisible in light of case law such as *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) and *Almanza-Arenas v. Lynch*, 815 F.3d 469, 475 (9th Cir. 2016) (en banc). The Ninth Circuit conducted its analysis in three phases: (1) examining the statutory text, (2) parsing the *Shepard* documents, and (3) surveying Oregon case law. The panel held that statutory text suggested that the ORS § 163.427 is divisible because it used disjunctive wording, indicating that the Legislature may have created separate offenses. The panel then confirmed its interpretation by analyzing the *Shepard* documents and noting that both the state court indictment and the plea petition closely track the language of paragraph (1)(a)(A), and mention that the victim was less than 14 years old. Finally, the panel reviewed state court decisions, and noted that they refer to the subparagraph (1)(a)(A) as containing "elements of the crime." *See State v. Marshall*, 350 Or. 208, 217 (2011). The panel dismissed Petitioner's argument that the case *State v. Parkins*, 346 Or. 333, 349 (2009), interpreting merger under ORS § 163.427, indicated the indivisibility of the statute. The panel also noted that the Court in *United States v. Rocha-Alvarado*, 843 F.3d 802, 807 (9th Cir. 2016), reached a similar result by using the modified categorical approach to determine that ORS § 163.427(1)(a)(A) was categorically the sexual abuse of a minor crime of violence for federal sentencing purposes.

4. *Esquivel-Santana v. Sessions*, 137 S. Ct. 1562 (2017)

Issues: *Aggravated Felony, Sexual Abuse of a Minor, Categorical Approach*

Holding: A statutory rape conviction under California Penal Code § 261.5(c) is categorically not a sexual abuse of a minor aggravated felony.

Practical Effect: If a respondent has a statutory rape conviction, and the state statute is based solely on an age differential between the victim and perpetrator and does not include any special relationship provision, the victim must be under 16 years old for the offense to possibly qualify as a sexual abuse of a minor aggravated felony.

Case Summary: The respondent was convicted of statutory rape in California, which is defined as "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator." *See* Cal. Pen. Code § 261.5(c). For purposes of this statute, California also defines a "minor" as a person under 18 years of age. The BIA found this three-year age differential meaningful enough for a conviction under § 261.5(c) to qualify as a sexual abuse of a minor aggravated felony, and the Sixth Circuit afforded this interpretation *Chevron* deference.

The Supreme Court reversed, determining that, under the categorical approach, the generic federal definition of "sexual abuse of a minor" unambiguously requires that the victim be younger than 16 years old, absent a special relationship between the perpetrator and victim. To define the age requirement in the generic federal definition, the Court relied on: (1) the traditional dictionary definition of "age of consent" being 16 years old; (2) the fact that the INA places sexual abuse of a minor in the same aggravated felony category as rape and murder, indicating that such a conviction must be "especially egregious"; and (3) that a related federal statute, 18 U.S.C. § 2243, as well as the majority of state criminal codes, use 16 as the age of consent.

The Court was careful to confine its holding to traditional statutory rape offenses that are based solely on an age differential between the participants, and not to offenses that include a special relationship between the victim and the perpetrator, such as between family members or teachers and students. The Court also left open whether the generic federal definition of sexual abuse of a minor also includes a minimum age differential when the victim is under 16 years old.

5. *United States v. Strickland,* 860 F.3d 1224 (9th Cir. 2017)

Issue: Crime of Violence

Holding: Under the Armed Career Criminal Act ("ACCA"), Oregon Revised Statutes ("ORS") § 164.395(1), Oregon's third-degree robbery statute, is not a violent felony because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another.

Practical Effects: While the Ninth Circuit's opinion analyzing ORS § 164.395(1) in the ACCA context is not binding on the categorical analysis conducted in the removal context, it is a reliable indicator that ORS § 164.395(1) is likely not a categorical crime of violence

in the removal context. If relying on this decision, Judges should ensure that it remains viable after the United States Supreme Court's expected decision in *Dimaya, cert granted* 137 S. Ct. 31.

Case Summary: Strickland pleaded guilty to being a felon in possession of a firearm, and received a mandatory minimum sentence of 15 years' imprisonment under the ACCA because the District Court held that he had a record of three prior convictions for violent felonies. A violent felony includes any crime punishable by imprisonment for a term exceeding one year that has as an element the use, attempted use, or threatened use of physical force against the person of another. 18 U.S.C. § 924(e)(2)(B)(i). On appeal, although the District Court based Strickland's sentence a different portion of the definition of a violent felony, the government argued that the element of "force" language applied to Strickland's prior third degree robbery conviction under ORS § 164.395(1), and supported the mandatory minimum sentence under the ACCA.

On review, the Ninth Circuit panel disagreed with the government's contention. Analyzing the Oregon statute under the categorical analysis set out in *Taylor* v. *United States*, 495 U.S. 575, 588–89 (1990), the panel found that Oregon's requirement of "force" was overbroad as compared to the generic definition of "force." Generic "force" as referred to in the ACCA requires "violent force," which is force capable of causing pain or injury to another. *Johnson* v. *United States*, 559 U.S. 133, 140 (2010). By contrast, the Oregon statute's force requirement may be satisfied in the absence of violent force, as illustrated by a series of Oregon cases related to purse-snatchings. *See, e.g.*, *State v. Johnson*, 168 P.3d 312, 313 (Or. Ct. App. 2007). The panel rejected the government's counterargument that the Oregon Supreme Court altered the force required by the Oregon statute in *State v. Hamilton*, 233 P.3d 432, 436 (Or. 2010). The panel did not conduct an analysis of the divisibility of "force" under ORS § 164.395(1).

6. *United States v. Perez-Silvan*, 861 F.3d 935 (9th Cir. 2017)

Issues: Crime of Violence

Holding: Tennessee Code Annotated ("TCA") § 39-13-102(a) is divisible into subsections (a)(1) and (a)(2), and subsection (a)(1), criminalizing intentional or knowing assault, triggers a crime of

violence sentencing enhancement under United States Sentencing Guidelines ("USSG") § 2L1.2(b)(1)(A)(ii) (2015).

Practical Effect: The panel applied the *Mathis* divisibility analysis and relied on the different punishments for subsections of the Tennessee statute to support its divisibility finding. 136 S. Ct. 2243, 2256 (2016). In reaching this conclusion, the panel distinguished state case law implying that the *mens rea* of aggravated assault is a single, unitary element. The panel's analysis could suggest increased emphasis on the disparate punishment method of determining divisibility.

Case Summary: On appeal, the Ninth Circuit panel affirmed the District Court's sentencing analysis. The panel examined whether the conviction under TCA § 39-13-102(a) has as an element the use, attempted use, or threatened use of physical force against the person of another. In conducting this inquiry, the panel employed the categorical approach as set out in *Taylor v. United States*, 495 U.S. 575, 602 (1990).

Perez-Silvan focused his argument on the *mens rea* of the assault statute; in particular, TCA § 39-13-102(a) contains two numbered subsections: (a)(1) and (a)(2). Subsection (a)(1) applies to intentional or knowing conduct, while (a)(2) refers to reckless conduct. Reckless behavior does not meet the generic definition of a crime of violence. *See Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc). However, the panel held that the two subsections referred to distinct levels of *mens rea* and were divisible, and Perez-Silvan's conviction under TCA § 39-13-102(a)(1), for intentional or knowing aggravated assault, was a crime of violence. Specifically, the panel reasoned that the difference in punishments prescribed for the subsections TCA § 39-13-102(a)(1) and (2) leads to the conclusion that the statutory alternatives *must be* elements. *See Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

The panel also disagreed with Perez-Silvan's characterization that TCA § 39-13-102(a) is not a crime of violence because it does not require violent force. Finally, the decision in *Perez-Silvan* was released alongside a companion decision also addressing crimes of violence under the USSG. *See United States v. Calvillo-Palacios*, Nos. 16-10039, 16-10077 (9th Cir. June 28, 2017).

7. *United States v. Ochoa*, 861 F.3d 1010 (9th Cir. 2017)

Issues: Firearms Offenses, Categorical Approach

Holding: 22 U.S.C. § 2778 is overbroad and indivisible. Because Defendant's conviction thereunder did not originally render him removable as charged either as an firearms trafficking aggravated felony, INA § 101(a)(43)(C), or under the certain firearms offenses ground, INA § 237(a)(2)(C), he could not be convicted of illegal reentry.

Practical Effect: 22 U.S.C. § 2778 is not a categorical match to the firearms trafficking aggravated felony or the firearms ground of removability under the INA. Moreover, it is not divisible with respect to the type of article being trafficked.

Case Summary: In a per curiam opinion, a Ninth Circuit panel granted a petition for rehearing, withdrew its December 2016 memorandum opinion, and reversed a conviction for illegal reentry. It held that because Defendant's conviction did not originally render him removable it could not serve as the basis for an illegal reentry conviction.

Utilizing the categorical approach, the panel examined 22 U.S.C. § 2778(b)(2), which provides that "[n]o defense articles or defense services . . . may be exported or imported without a license." The Munitions List referenced in the broader statute designates that defense articles and services includes firearms, military equipment, "underwater hardware," and various chemicals. *See* 22 C.F.R. § 121.1. The panel first held that because 22 U.S.C. § 2778 includes the entire array of munitions on that regulatory list, its elements sweep more broadly than the generic and do not categorically match the elements of aggravated felony firearm trafficking or the firearm offense ground of removability.

Proceeding to divisibility, the panel examined the statutory text and case law to determine whether the items on the Munitions List were elements or means. When the answer to that question remained unclear, the panel employed a "peek" at the indictment; the panel saw that Defendant pled to one count alleging conspiracy to export both "firearms and ammunition" designated as defense articles on the Munitions List. Citing *Mathis*, the panel noted that the indictment's combining of firearms and ammunitions into a single count indicated that the items on the munitions list were means of commission, not

elements. Moreover, to the extent that the elements/means question remained unclear, such uncertainty did not satisfy *Taylor*'s demand for certainty in determining whether a conviction was for a generic offense. As the statute was overbroad and indivisible, the panel did not proceed to the modified categorical analysis. Also of note, Defendant's underlying conviction was for a conspiracy to export defense articles in violation of 18 U.S.C § 371, the generic federal conspiracy statute, and the IJ initially found him removable as an aggravated felon under INA § 101(a)(43)(U). Because it found that that the object offense of the conspiracy, § 2778, was indivisible and overbroad, the panel did not reach Defendant's arguments regarding 18 U.S.C. § 371.

8. *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc).

Issues: Divisibility and the Modified Categorical Approach

Holding: California Health and Safety Code section 11352 is not categorically a drug trafficking offense, and is divisible as to the controlled substance and the actus reus.

Practical Effect: The Ninth Circuit called into question its entire line of cases ruling on California drug statutes. Immigration Judges must conduct a modified categorical analysis to determine whether a respondent convicted under CHSC § 11352, or a similar California drug statute, has committed a federal drug trafficking offense.

Case Summary: Martinez-Lopez challenged a 16-level sentence enhancement imposed by the district court after it found that his conviction under CHSC § 11352 was a felony drug trafficking offense. The Ninth Circuit took the case en banc to revisit the divisibility of California drug statutes after the Supreme Court's remand in *Guevara v. United States*, 136 S. Ct. 2542 (2016), which instructed the Ninth Circuit to reconsider the divisibility of CHSC § 11351 in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016). The Ninth Circuit stated that, because *Guevara* was based on numerous related decisions involving similar California drug statutes, it is responding the Supreme Court instructions by revisiting the entire line of cases.

First, the Ninth Circuit held that CHSC § 11352, like many California drug statutes, is not a categorical match with a federal drug trafficking offense because it criminalizes a broader range

of activity and greater variety of controlled substances than federal law.

Second, the Court relied on *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Mathis* to determine that the statute is divisible. In so doing, the Court affirmed its decision in *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014), but noted many of its prior decisions "put undue emphasis on the disjunctive-list rationale criticized in *Mathis*", thereby calling into question its line of cases preceding *Rendon*. The Court held that CHSC § 11352 is divisible as to the controlled substance prong, finding that California Supreme Court decisions, which routinely subject defendants to multiple convictions under a single statute for a single act as it relates to multiple controlled substances, decisively showed each drug was a separate element of the offense. The Court similarly relied on California Supreme Court decisions to hold that CHSC is divisible as to the actus reus because it unequivocally held CHSC § 11352 creates separate crimes based on alternative actus rei elements including the "importation, sale, furnishing, administration, etc.," of each of the listed drugs.

9. *Sales v. Sessions*, 868 F.3d 779 (9th Cir. 2017)

Issues: Realistic Probability Test, Aggravated Felony, Aiding and Abetting

Holding: A second degree murder conviction under California Penal Code § 187(a) based on an aiding and abetting theory is an aggravated felony.

Practical Effect: A conviction under CPC § 187(a) based on aiding and abetting is an aggravated felony "absent a showing that the law has been applied in some 'special' way."

Case Summary: The Petitioner filed a petition for review, arguing that California law on aiding and abetting is broader and encompasses greater criminal liability than that recognized by the Supreme Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 187 (2007), and that his conviction is therefore broader than the generic offense. Petitioner argued, relying on *People v. Cruz-Santos*, 2015 WL 7282040 (Cal. Ct. App. Nov. 18, 2015), that "California allows a defendant to be convicted of murder on a

theory of natural and probable consequences when the defendant intended only to aid and/or abet a non-violent crime."

The panel denied the petition for review. Although the California Court of Appeal in *Cruz-Santos* upheld a conviction where the target offense included "cultivation of marijuana," the panel noted that the jury in that case found "the murder to have been a natural and probable consequence of a large marijuana growing operation patrolled by heavily armed guards," who also threatened the victim. The panel explained that a California Supreme Court justice's opinion dissenting from the denial of the petition for review of *Cruz-Santos* was inconsequential because it did not show that the natural and probable consequences doctrine applied in Petitioner's case "deviated from the way the United States Supreme Court described it in *Duenas-Alvarez*." The panel also noted that the California Supreme Court recently reaffirmed aider and abettor liability in *People v. Chiu*, 325 P.3d 972 (Cal. 2014), which explained that second degree murder "is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably and foreseeably result in a murder . . . ." The panel concluded that Petitioner failed to show a mismatch in liability between CPC § 187(a) and the generic federal definition.

10. *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017)

Issues: Crime of Violence, Categorical Approach

Holding: Second-degree assault under Washington Revised Code ("Wash. Rev. Code") § 9A.36.021 is overbroad and not divisible. Thus it is not a "crime of violence" within the meaning of the U.S. Sentencing Guidelines.

Practical Effect: Wash. Rev. Code § 9A.36.021 is not a "crime of violence." The Ninth Circuit's decision in *United States v. Lawrence*, 627 F.3d 1281 (9th Cir. 2010), no longer controls.

Case Summary: In the context of criminal sentencing, the District Court held that the defendant's conviction for Washington Revised Code ("Wash. Rev. Code") § 9A.36.021 was a "crime of violence" for the purpose of a sentence enhancement. The defendant appealed, arguing that the statute is not divisible in light of *Mathis*.

The panel first held that *United States v. Lawrence*, 627 F.3d 1281 (9th Cir. 2010), in which the Ninth Circuit held that Wash. Rev. Code § 9A.36.021 is a crime of violence, no longer controls because the Supreme Court's intervening precedent in *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016) now requires the panel to determine whether the statute is divisible. The panel held that *Lawrence* no longer controls because its reasoning is clearly irreconcilable with the reasoning of *Descamps* or *Mathis*.

The panel then applied the categorical approach and held that Wash. Rev. Code § 9A.36.021 is not a "crime of violence" because it is overbroad and indivisible. Under the first step, the panel determined that the statute criminalizes conduct that does not require "violent force," specifically that subsection (1)(e) does not require "the actual attempted or threatened use of force capable of causing physical pain or injury to another." The panel also looked to the statute, state case law, and jury instructions to determine that a jury is not required to unanimously decide which of the statute's listed alternatives had been committed. The Ninth Circuit thus found that the alternatives were means and not elements, making the statute indivisible.

11. *United States v. Ocampo-Estrada*, 873 F.3d 661 (9th Cir. 2017)

Issues: California Health and Safety Code § 11378, Categorical Approach, Controlled Substances

Holding: The controlled substance that forms the basis of CHSC § 11378 conviction is a divisible element, but the government could not meet its burden to establish the controlled substance element by relying on information outside of the *Shepard* documents.

Practical Effect: The IJ should look only to the *Shepard* documents to determine what element formed the basis of a CHSC § 11378 conviction.

Case Summary: Defendant was convicted of conspiracy to distribute methamphetamine under 21 U.S.C. §§ 841(a)(1), 846. The District Court found that Defendant's prior conviction under CHSC § 11378 was a "felony drug offense" under 21 U.S.C. § 841(b)(1)(A), triggering a twenty-year minimum sentence. Defendant appealed, arguing on appeal that his CHSC § 11378 did not qualify as a felony drug offense.

The panel vacated Defendant's sentence. Relying on *United States v. Martinez-Lopez*, — F.3d —, 2017 WL 3203552 (9th Cir. July 28, 2017) (en banc), the panel held that CHSC § 11378 is divisible with respect to its controlled-substance requirement. However, the panel concluded that the government failed to meet its burden to show that Defendant's prior conviction qualifies as a felony drug offense. First, the *Shepard* documents did not disclose which controlled substance element Defendant pleaded guilty to as part of his CHSC § 11378 conviction. Second, the government could not rely on Defendant's statement that the offense "involved 57 grams of methamphetamine" because "it is outside the 'limited class of documents' *from a prior record of a prior conviction* upon which a sentencing court may rely[.]" Further, Defendant's statement "does not constitute an admission that methamphetamine *was the element of section 11378 to which* [*Defendant*] *pleaded guilty*[.]"

12. *United States v. Slade*, 873 F.3d 712 (9th Cir. 2017)

Issues: Crime of Violence, Categorical Analysis

Holding: As per *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017), second-degree assault under Washington Revised Code ("Wash. Rev. Code") § 9A.36.021 is overbroad and not divisible. Thus, it is not a "crime of violence" within the meaning of the U.S. Sentencing Guidelines.

Practical Effect: The Ninth Circuit's decision in *United States v. Jennen*, 596 F.3d 594 (9th Cir. 2010), no longer controls and Wash. Rev. Code § 9A.36.021 is not a "crime of violence."

Case Summary: The District Court held that the defendant's conviction for Washington Revised Code ("Wash. Rev. Code") § 9A.36.021 was a "crime of violence" for the purpose of a sentence enhancement. The defendant appealed, arguing that the statute is not divisible in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016).

Applying the modified categorical approach described in *Mathis*, the panel reiterated its holding in *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017), and held that Wash. Rev. Code § 9A.36.021 is not a "crime of violence" because it is overbroad and indivisible. In doing so, the Ninth Circuit

concluded that *United States v. Jennen*, 596 F.3d 594 (9th Cir. 2010) is no longer good law.

13. *United States v. Murillo-Alvarado*, 876 F.3d 1022 (9th Cir. 2017)

Issues: Modified Categorical Approach

Holding: California Health and Safety Code section 11351 is not categorically a drug trafficking offense and is divisible as to the controlled substance requirement.

Practical Effect: The controlled substances incorporated in CHSC § 11351 are elements establishing separate offenses, and Immigration Judges must conduct a modified categorical analysis to determine whether a respondent convicted under CHSC § 11351 has committed a federal drug trafficking offense.

Case Summary: The Ninth Circuit panel affirmed the district court's sentencing analysis. Utilizing the categorical approach, the panel held that CHSC § 11351 is not a categorical match with a federal drug trafficking offense because it includes a broader range of controlled substances than federal law. Next, the panel relied on *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), to find that the statute is divisible. The panel noted that a similar question was addressed in *Martinez-Lopez*, where the Nine Circuit found CHSC § 11352 to be divisible, and the panel found that the cross-referenced list of substances in CHSC § 11351 is a subset of the list referenced in CHSC § 11352. Furthermore, the jury instructions for CHSC § 11351 require the jury identify and unanimously agree on one controlled substance, treating the particular controlled substance as an element, not a means.

Finally, the panel conducted a modified categorical analysis and examined the guilty plea form, criminal information, district court's minute order, and abstract of judgment, finding that petitioner's conviction under CHSC § 11351 qualifies as a drug trafficking offense.

14. *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017)

Issues: Categorical Approach, Aggravated Felony

Holding: A conviction for possession with intent to deliver a controlled substance Wash. Rev. Code § 69.50.401(a) is not categorically an aggravated felony under INA § 101(a)(43)(B) because the

mens rea requirement for Washington's accomplice liability statute is overbroad and indivisible.

Practical Effects: Wash. Rev. Code § 69.50.401(a) is not categorically an aggravated felony because the under Washington law, the aiding and abetting statute is included in the drug trafficking offense.

Case Summary: The panel applied the categorical approach articulated in *Taylor v. United States*, 495 U.S. 575 (1990) and held that Wash. Rev. Code § 69.50.401(a) is not categorically an aggravated felony. The panel noted that federal law requires a mens rea of specific intent for a conviction for aiding and abetting, whereas Washington requires merely knowledge. As a result, the Washington drug trafficking law on its face has a more inclusive mens rea requirement for accomplice liability than the federal generic trafficking law. The panel concluded that Valdivia-Flores's drug trafficking conviction was not an aggravated felony under the categorical approach and could not support the asserted basis for Valdivia-Flores's 2009 removal order.

15. *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017)

Issues: Categorical Approach, Crime of Violence

Holding: The term "intimidation" in the federal carjacking statute 18 U.S.C. § 2119 "necessarily entails the threatened use of violent physical force."

Practical Effect: The federal offense of carjacking, 18 U.S.C. § 2119, is categorically a crime of violence under 18 U.S.C. § 924(c)(3).

Case Summary: The Ninth Circuit affirmed that carjacking, whether committed "by force and violence" or "by intimidation," qualifies as a crime of violence under the *Johnson* standard. *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (A defendant cannot put a reasonable person in fear of bodily harm without threatening to use "force capable of causing physical pain or injury."). Relying on decisions from other circuits and the Ninth Circuit's determination that the term "intimidation" as used in the federal bank robbery statute necessarily includes an implicit threat to use violent physical force, the Court held that the term "intimidation" in the federal carjacking statute requires a "contemporaneous threat to use force." As such, the federal offense of carjacking, 18 U.S.C. § 2119, is categorically a crime of violence.

16. *United States v. Werle*, 877 F.3d 879 (9th Cir. 2017)

Issues: Categorical Approach, Crime of Violence

Holding: A conviction for felony harassment under Washington Revised Code ("Wash. Rev. Code") § 9A.46.020(2)(b)(ii) for knowingly threatening to kill necessarily includes a "threatened use of physical force against the person of another." Thus, it is a crime of violence within the meaning of the U.S. Sentencing Guidelines.

Practical Effect: A conviction for felony harassment under Wash. Rev. Code § 9A.46.020(2)(b)(ii) is categorically a crime of violence under U.S.S.G. § 4B1.2(a).

Case Summary: The district court held that Petitioner's prior convictions for felony harassment, as defined in Wash. Rev. Code § 9A.46.020(2)(b)(ii), were crimes of violence under U.S.S.G. §4B1.2(a) for the purpose of imposing a sentence enhancement. Petitioner appealed, arguing that the district court erred in determining that his convictions for felony harassment via a threat to kill were crimes of violence. Petitioner argued that § 9A.46.020(2)(b)(ii) is broader than the federal definition of crime of violence because (1) it lacks the requisite *mens rea* to constitute a threatened use of force, (2) it includes threats to kill in the distant future, and (3) it does not necessarily require threatened violent force.

Applying the categorical approach as defined in *Taylor v. United States*, the panel rejected Petitioner's arguments that the statute is overbroad. 495 U.S. 575 (1990). In accordance with its precedent, the panel determined that the Washington statute requires a *mens rea* beyond mere negligence, the federal definition of crime of violence contains no immediacy requirement for the threatened use of physical force, and a threat to kill necessarily includes threatened violent physical force. Accordingly, the panel held that a conviction for felony harassment under Wash. Rev. Code § 9A.46.020(2)(b)(ii) is categorically a crime of violence under U.S.S.G. § 4B1.2(a)(1).

17. *Villavicencio v. Sessions*, 879 F.3d 941 (9th Cir. 2018)

Issues: Categorical Approach, Aggravated Felony, Controlled Substance Offense

Holding: Petitioner's convictions of the Nevada state crimes § 199.480 (drug conspiracy), and § 454.351 (possession of a controlled substance), do not render him removable under INA § 237(a)(2)(B)(i) or INA § 237(a)(2)(A)(iii).

Practical Effect: Nevada Revised Statutes (N.R.S.) §§ 199.480 and 454.351 are not a categorical match to the federal generic statues because they are overbroad and indivisible. N.R.S. § 199.480 criminalizes a broader range of conduct than the generic definition of conspiracy, and N.R.S. § 454.351 encompasses a wider range of substances and conduct than those set forth in the federal Controlled Substances Act.

18. *United States v. Brown*, 879 F.3d 1043 (9th Cir. 2018)

Issues: Categorical Analysis, Controlled Substance Offense

Holding: The definition of conspiracy within the Washington Criminal Code is overbroad and covers conduct that would not be covered under federal law. A conviction for drug conspiracy under Washington state law does not constitute "a controlled substance offense" for federal sentencing purposes.

Practical Effect: A drug conspiracy conviction under Revised Code of Washington ("RCW") Title 69 is not a "controlled substance offense."

Case Summary: Applying the modified categorical approach described in *Taylor v. United States*, 495 U.S. 575 (1990), the panel held that the definition of conspiracy, under Title 9A of the Washington Criminal Code, is overbroad because the statute, unlike federal law, punishes individuals who conspire with law enforcement officers who did not intend that a crime be committed. Under federal law, a defendant cannot be convicted of conspiracy if the only alleged coconspirator is a law enforcement officer. *See United States v. Lo*, 447 F.3d 121, 1225 (9th Cir. 2006).

Additionally, the panel found that the definition of conspiracy under Title 9A also applies to the drug conspiracy offense described in Title 69 of the Washington Criminal Code. In rendering its decision, the panel relied on *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009-10 (9th Cir. 2015), which found "if a state statute explicitly defines a crime more broadly than the generic definition, no legal imagination is required to hold that a realistic probability exists that a state will apply its statute to conduct that falls outside the generic definition of the crime."

Neither the defendant nor the government argued that the Washington drug conspiracy statute is divisible.

19. *Solorio-Ruiz v. Sessions*, 881 F.3d 733 (9th Cir. 2018)

Issues: Categorical Approach, Aggravated Felony, Crime of Violence

Holding: Carjacking under California Penal Code ("CPC") § 215(a), which does not require "violent force," does not constitute a crime of violence aggravated felony under INA § 101(a)(43)(F).

Practical Effect: While a conviction under CPC § 215(a) is not a crime of violence, such a conviction may constitute a theft offense under INA § 101(a)(43)(G).

Case Summary: In light of the Supreme Court's decision in *Johnson v. United States*, 559 U.S. 133, 140 (2010), which held that the physical force required of a crime of violence must be "violent force" capable of causing physical pain or injury, the panel overruled *Nieves-Medrano v. Holder*, 590 F.3d 1057, 1058 (9th Cir. 2010), which previously concluded that CPC § 215(a) is categorically a crime of violence.

The panel reasoned that *Nieves-Medrano* did not address the level of violence essential to a conviction under CPC § 215(a). Employing the categorical approach, the panel concluded that California law only requires force in excess of that required to seize the vehicle, however slight it may be. *People v. Hudson*, 217 Cal. Rptr. 3d 775, 782 (Ct. App. 2017). Thus, California carjacking is not a crime of violence under INA § 101(a)(43)(F).

However, the panel acknowledged that an open question remains as to whether or not CPC § 215(a) constitutes an aggravated felony theft offense under INA § 101(a)(43)(G).

20. *Elmakhzoumi v. Sessions*, 883 F.3d 1170 (9th Cir. 2018)

Issues: Aggravated Felony

Holding: A violation of California Penal Code ("CPC") § 286(i) is an aggravated felony offense under the INA because the conduct prohibited by CPC § 286(i) falls within the generic definition of "rape" articulated in *Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000).

Practical Effect: A conviction under CPC § 286(i) is an aggravated felony and therefore an applicant convicted under this statute cannot meet the INA's good moral character requirement for naturalization.

Case Summary: Elmakhzoumi was convicted under CPC § 286(i) for sodomy under circumstances where "the victim is prevented from resisting by an intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused." CPC § 286(i). Elmakhzoumi argued that non-consensual sodomy, as described by CPC § 286(i), is not rape within the meaning of 8 U.S.C. § 1101(a)(43)(A), and therefore is not an aggravated felony. The Ninth Circuit disagreed, holding that the conduct prohibited by CPC § 286(i) falls entirely within the generic definition of "rape" as articulated in *Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000) (defining rape, as used in 8 U.S.C. § 1101(a)(43)(A), to "include the act of engaging in non-consensual sexual intercourse with a person whose ability to resist has been substantially impaired by drugs or other intoxicants.").

The panel also reaffirmed that one cannot use the federal statutes to determine the generic definition of "rape" under the INA. *See Castro-Baez*, 217 F.3d at 1059 ("[T]he definition of rape under federal law simply has no bearing on whether [Petitioner]'s state conviction constitutes an 'aggravated felony' for purposes of establishing his deportability.").

21. *United States v. Studhorse*, 883 F.3d 1198 (9th Cir. 2018)

Issue: Crime of Violence, Categorical Approach

Holding Attempted first degree murder in violation of Revised Code of Washington sections 9A.32.030(1) and 9A.28.020(1) constitutes a crime of violence under 18 U.S.C. § 16(a). Further, attempted first degree murder under Washington law is a crime of violence under the United States Sentencing Guidelines.

Practical Effect: A conviction for attempted first degree murder under Washington law is a crime of violence.

Case Summary: Relying on *Ramirez v. Lynch*, 810 F.3d 1127, 1130–31 (9th Cir. 2016), the panel held that attempted first degree murder under Washington law constitutes a crime of violence under 18 U.S.C. § 16(a) because it requires specific intent and has as an element

an intentional, threatened, attempted, or actual use of force. For the same reasons, attempted first degree murder under Washington law is a crime of violence under USSG § 4B1.2(a).

22. *United States v. Verduzco-Rangel*, 884 F.3d 918 (9th Cir. 2018)

Issues: Modified Categorical Approach, Aggravated Felony

Holding: The panel reaffirmed that a conviction under California Health and Safety Code ("CHSC") § 11378 is an aggravated felony for purposes of INA § 237(a)(2)(A)(iii) where the record of conviction establishes that the substance involved was federally controlled.

Practical Effect: Under the modified-categorical analysis, a violation of CHSC § 11378 is an aggravated felony where the substance involved was federally controlled.

Case Summary: The panel recognized that CHSC § 11378 is divisible as to which substance Defendant was convicted of actually trafficking, and that courts can therefore look to underlying records to determine whether a conviction was for a federally banned substance. Defendant's 2004 indictment and plea agreement establish that he was convicted of trafficking methamphetamine, which is a controlled substance under both California and federal law.

The panel relied on one of two routes, as laid out in *Rendon v. Mukasey*, for finding that a state drug felony qualifies as a drug trafficking aggravated felony. 520 F.3d 967, 974 (9th Cir. 2008).

The panel wrote that because CHSC § 11378 has a trafficking element and requires a sufficiently culpable state of mind, CHSC § 11378 is a drug trafficking aggravated felony under INA § 101(a)(43)(B) where the record of conviction establishes that the substance involved is federally controlled.

The panel noted that this decision is not contrary to the recent decision in *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017). In *Valdivia-Flores*, the Washington statute criminalized aiding and abetting by either knowingly or intentionally assisting a principal, whereas federal law only criminalized intentionally assisting. Here, by comparison, knowingly possessing for sale a substance controlled only by state law involves an equally culpable state of mind as

knowingly possessing for sale a substance controlled by federal law.

VIII. Burden of Proof

A. *Marinelarena v. Sessions*, 886 F.3d 737 (9th Cir. 2018) (granting re-hearing en banc)

IX. Board of Immigration Appeals & Jurisdiction

A. Reasonable Fear Hearings

1. *Bibiano v. Lynch*, 834 F.3d 966 (9th Cir. 2016)

Issues: Reasonable Fear Proceedings, Venue

Holding: INA § 242's venue provision is non-jurisdictional

Practical Effect: Where a respondent is ordered removed in one circuit and later challenges a BIA decision involving a reinstated removal order and subsequent reasonable fear proceedings which occurred in a different circuit, venue is proper in the latter.

Case Summary: Petitioner filed affirmatively for asylum. Her application was referred and she was ordered removed *in absentia* by an IJ in Los Angeles in 1995. In 2009, Petitioner, then residing in South Carolina, was removed under that order. She subsequently reentered the United States, was detained in Georgia, and DHS moved to reinstate the original removal order. Based on a reasonable fear interview, she was placed in withholding-only proceedings in Atlanta. Her applications for relief were denied and the BIA affirmed, applying Eleventh Circuit law. She filed a petition for review with the Ninth Circuit. The government moved to transfer to the Eleventh Circuit and also requested remand for the BIA to reconsider the merits of petitioner's case.

The Ninth Circuit did not reach the merits of petitioner's case. Instead, in resolving a question that it had previously left open, the panel held that INA § 242's venue provision is nonjurisdictional, consistent with a "clear consensus" among the circuits. The panel continued to explain that although it had subject matter jurisdiction, venue was not proper in the Ninth Circuit because "the substance of the immigration proceedings that underlie this appeal occurred in the Eleventh Circuit."

2. *Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017)

Issues: Reasonable Fear Determinations, Reinstated Removal Orders

Holding: (1) The Ninth Circuit has jurisdiction over petitions to review the outcome of reasonable fear proceedings in connection with reinstated expedited orders of removal; (2) the petition for review was timely because it was filed within 30 days of the Board's notification that it lacked jurisdiction; and (3) the Immigration Judge erred in denying a motion to reconsider his decision that extortion and threats did not constitute persecution.

Practical Effect: (1) Unlike the Board, the Ninth Circuit has jurisdiction to review reasonable fear determinations rendered in connection with the reinstatement of expedited orders of removal, and (2) extortion and threats of violence based on a protected ground can constitute persecution.

Case Summary: Ayala's appeal process was convoluted. After appealing the asylum officer's negative reasonable fear determination and moving for the IJ to reconsider his reasonable fear determination, she received contradictory and incorrect notices. One notice stated that the IJ's determination was the "final order" and included the statement that "[t]here is no appeal available," despite the availability of a petition for review with the Ninth Circuit. Next, after the IJ denied her motion to reopen and to reconsider, the immigration court sent her a copy of the decision with a cover sheet indicating that the IJ decision was final unless she filed an appeal with the Board within 30 days, even though the Board lacked jurisdiction to review reasonable fear determinations. After an unsuccessful appeal to the Board, which the Board dismissed for lack of jurisdiction, Ayala petitioned for review with the Ninth Circuit, which granted the petition.

The panel held that it had jurisdiction to consider petitions for review arising from reasonable fear determinations in the reinstatement of expedited orders of removal. The panel also determined that the petition was timely under the circumstances. Although a petitioner is required to file within 30 days of the final administrative order of removal, here the misleading notices given to petitioner justified treating the Board's notice, rather than the IJ's decision, as the final administrative order. Therefore, the petition was timely. Finally, the panel held that the IJ erred in finding that

the threats and extortion here bore no nexus to a protected ground. Specifically, citing *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc) and other case law, the panel noted that the targeting of the harm at Ayala's family members raised the possibility that the harm she fears relates to a cognizable particular social group of her family members.

3. *Martinez v. Sessions*, 873 F.3d 655 (9th Cir. 2017)

Issues: Appeals, Reasonable Fear Determinations

Holding: The petition for review of the Immigration Judge's negative reasonable fear determination was timely because it was filed within 30 days of the BIA's notification to petitioner that the BIA lacks jurisdiction on such matters.

Practical Effect: Until the BIA improves its process for dismissing incorrectly filed appeals of negative reasonable fear determinations, the Ninth Circuit will allow petitioners to file such appeals within 30 days of the BIA's dismissal notice.

Case Summary: Martinez, a citizen of El Salvador who was previously removed from the United States, was referred to an asylum officer after he expressed a fear of returning to El Salvador. The asylum officer determined that Martinez did not establish a reasonable fear of torture or persecution and an Immigration Judge concurred with the finding.

After an unsuccessful appeal to the BIA, which the BIA dismissed for lack of jurisdiction, Martinez petitioned for review with the Ninth Circuit. He filed the petition 50 days after the Immigration Judge's determination despite a statutory requirement that petitions for review of negative reasonable fear determinations be filed within 30 days of a final administrative order.

Relying on its decision in *Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017), the panel held that "conflicting and confusing information" justified treating the BIA's dismissal notice, rather than the Immigration Judge's decision, as the final administrative order. Even though the BIA did not directly misinform Martinez, as it did the petitioner in *Ayala*, the misleading regulations, statutes, practice manual, and BIA filing receipt subjected Martinez to "a trap for the unwary." Therefore, since Martinez filed his petition for review

with the Ninth Circuit within 30 days of the BIA's dismissal notice, the petition was deemed timely.

B. *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2017), *petition for cert. filed* (May 18, 2018) (No. 17-1568)

Issues: Reinstatement of Removal Proceedings, Withholding-Only Proceedings, Bond Jurisdiction

Holding: Reinstated removal orders are administratively final regardless of ongoing withholding-only proceedings. Detention based on such orders is governed by INA § 241(a), not INA § 236(a).

Practical Effect: Aliens in detention based on reinstated removal orders for whom withholding-only proceedings are ongoing are not entitled to initial bond hearings. The panel indicated that such aliens remain entitled to a bond hearing in circumstances of prolonged detention. *See Padilla-Ramirez* at *6; *see also Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011).

Case Summary: Proceedings against Padilla-Ramirez commenced in 2006. His applications for asylum, withholding, and Protection under the Convention Against Torture were denied but he was granted voluntary departure. He failed to depart voluntarily, the removal order became effective in January 2009, and he was physically removed to El Salvador in 2010. ICE later reinstated the removal order pursuant to INA § 241(a)(5). He then participated in reasonable fear proceedings and was referred to an IJ for withholding-only proceedings which are ongoing. An IJ denied Padilla-Ramirez's request for a bond hearing and the district court denied his habeas corpus petition. A three-judge panel of the Ninth Circuit affirmed.

INA § 236(a) permits discretionary detention of aliens "pending a decision on whether the alien is to be removed from the United States." INA § 241(a)(2) requires detention during the 90-day removal period and aliens so detained are not eligible for bond. The parties contested the INA section under which he was detained; the panel held that because Padilla-Ramirez's reinstated removal order is administratively final, INA § 241(a) governs his detention. Beginning with the text of INA § 241(a)(5), the panel reasoned that just as a removal order itself is administratively final when it is first executed, if that order is reinstated from the original date it "retains the same administrative finality because [INA § 241(a)(5)] proscribes any challenge that might affect that status." *See Padilla-Ramirez* at

*9. The panel added that the reinstatement provision's location within § 241, specifically among the detention and supervision provisions, supported that reading.

Because the initial order of removal is not at issue in withholding-only proceedings and because those proceedings do not override the general prohibition on reopening or review of the prior order, the panel explained that the outcome of withholding-only proceedings does not impact the finality of the removal order. The panel also described that INA § 236(a) did not apply to withholding-only proceedings, emphasizing that withholding-only proceedings involve not a pending decision about *whether* an alien was to be removed from the United States, a decision already made, but rather the narrower question of *to where* the alien may be removed.

The panel turned to Padilla-Ramirez's argument that Ninth Circuit precedent regarding finality of reinstated orders controlled the Court's decision for detention purposes. It distinguished *Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012) and its more recent decision in *Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017), both of which involved reinstated orders in circumstances where the finality determination impacted the availability of judicial review. Those cases held that a reinstated removal order was not final until the conclusion of withholding-only proceedings. The panel emphasized that the constitutional and judicial review considerations present *Ortiz-Alfaro* and *Ayala* were not present with respect to finality for detention purposes and that those cases were not controlling in the detention context.

Finally, the panel acknowledged that its holding created a circuit split with the Second Circuit's decision in *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016). Despite its aversion to creating such a spilt, the panel explained its disagreement with *Guerra*, its belief in the clarity of the text and legislative history, and invited the Supreme Court to harmonize the lines of authority.

X. Voluntary Departure

A. *Singh v. Lynch*, 835 F.3d 880 (9th Cir. 2016)

Issues: Final Order of Removal, Voluntary Departure and Advisals

Holding: A Board decision that affirms an IJ's denial of asylum, withholding, and protection under the Convention Against Torture, but remands to the IJ solely for voluntary departure proceedings, becomes a final order of removal at the time of the Board's decision.

Practical Effect: IJs should provide voluntary departure advisals pursuant to 8 C.F.R. § 1240.26(c)(3) at the time a decision is issued.

Case Summary: The IJ denied Petitioner's applications for asylum, withholding of removal, and protection under CAT. The IJ granted Petitioner voluntary departure, but did not provide the required voluntary departure advisals. The BIA affirmed, but remanded Petitioner's case to the IJ to provide voluntary departure advisals. *See* 8 C.F.R. § 1240.26(c)(3), (3)(ii). On remand, the IJ provided the voluntary departure advisals. Petitioner again appealed to the BIA which summarily dismissed his appeal and ordered him removed pursuant to the IJ's alternative order. Petitioner filed a timely petition for review to the Ninth Circuit following the BIA's second decision.

The panel noted that it only has jurisdiction to review a final order of removal, which is created by: (1) a determination by the BIA affirming an IJ's order; or (2) the expiration of the period in which the alien is permitted to seek review of such an order by the BIA. *See* INA § 101(a)(47)(B). The panel held that "the BIA's decision denying asylum, withholding of removal, and CAT protection but remanding to the IJ for voluntary departure is a final order of removal[.]" *Pinto v. Holder*, 648 F.3d 976, 980 (9th Cir. 2011). Therefore, the panel held that it did not have jurisdiction over Petitioner's case because "the IJ's order became unreviewable . . . upon expiration of the 30 day period to petition for review" following the BIA's first decision affirming the denial of asylum, withholding of removal, and protection under CAT, but remanding for voluntary departure advisals.

B. *Chavez-Garcia v. Sessions*, 871 F.3d 991 (9th Cir. 2017)

Issues: Validity of Waiver of the Right to Appeal

Holding: Petitioner's departure from the United States, without more, did not constitute a "considered" and "intelligent" waiver of the right to appeal the removal order, and therefore did not meet the constitutional requirements of a valid waiver.

Practical Effect: Immigration Judges must inform respondents who request removal from the United States that their departure would constitute a waiver of the right to appeal.

Case Summary: Petitioner argued that he did not provide a valid waiver of his right to appeal the IJ's decision to the BIA by virtue of his departure alone, and that he specifically reserved his right to appeal the removal order during his proceedings. Relying on 8 C.F.R. § 1003.3(e), the Government argued that Petitioner's departure, without more, amounted to a constitutionally valid waiver of his right to appeal. The Government also observed that Petitioner's "Request for Immediate Departure" from the United States constituted a "considered" and "intelligent" waiver of the right to appeal.

The panel rejected the Government's argument, holding that an alien's departure from the United States alone does not provide clear and convincing evidence of a "considered" and "intelligent" waiver of the right to appeal, and therefore does not comport with the constitutional requirements of a valid waiver. Without considering Petitioner's "Request for Immediate Removal," the panel determined that, notwithstanding the express language of the departure-waiver regulation, the IJ must advise the alien who requests immediate departure that the departure would amount to a waiver of the right to appeal. Thus, the "IJ's failure to inform [Petitioner] that his departure would constitute a waiver of his previously reserved right to appeal to the BIA renders [Petitioner's] purported waiver invalid."

XI. Mental Competency

A. *Meija v. Sessions*, 868 F.3d 1118 (9th Cir. 2017)

Issues: Competency, Mental Health, *Matter of M-A-M-*

Holding: Failure to hold a *Matter of M–A–M–* hearing to articulate an assessment of competence and discuss appropriate procedural safeguards is an abuse of discretion where a respondent shows "clear indicia" of incompetency.

Practical Effect: If a respondent shows clear indicia of incompetency, such as a history of mental illness, testimony that the respondent is not taking related medication, testimony that the respondent is feeling unwell, or evidence that the respondent cannot effectively communicate, then under *Matter of M–A–M–* the immigration judge should: (1) articulate an assessment of the respondent's competence; and (2) discuss what, if any, procedural safeguards were adopted and why they are adequate.

Case Summary: Petitioner's applications for asylum, withholding of removal, and protection under the Convention Against Torture were denied by the Immigration Judge (IJ) after three hearings. At the first hearing, Petitioner testified that he witnessed the death of family members and suffered a severe head injury that knocked him unconscious. Petitioner also disclosed that he took medication for major depression with psychotic features. At a second hearing, Petitioner testified that "he was not taking his medication and that he was 'not functioning quite well' because 'there's an ongoing fight in, in between his mind,' and that he felt a 'very strong pressure inside his head.'" The IJ granted a continuance to hear from Petitioner's parents, who testified at a third hearing about Petitioner's medical condition and the medications he took. The BIA affirmed.

The panel granted Petitioner's petition for review, explaining that the indicia of incompetence displayed by Petitioner "triggered the IJ's duty to explain whether Petitioner was competent and whether procedural safeguards were needed," under *Matter of M–A–M–*, 25 I&N Dec. 474, 480 (BIA 2011). The panel explained that *Matter of M–A–M–* has rigorous procedural requirements that must be followed where there are clear indicia of incompetency.

B. *Calderon-Rodriguez v. Sessions*, 878 F.3d 1179 (9th Cir. 2018)

Issues: *M-A-M-* competency determination, *Franco-Gonzalez* class members

Holding: The BIA abused its discretion by affirming an IJ's inaccurate factual finding—which relied on outdated mental health

evidence—and the IJ's departure from *Matter of M-A-M-* competency determination standards.

Practical Effect: When indicia of incompetence are present, IJs must assess a respondent's competence under the competency determination standards discussed in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). IJs must also ensure that DHS complies with its obligation to provide the court with relevant materials in its possession regarding the respondent's competency.

Case Summary: The panel noted that IJs must make further inquiry to determine the respondent's competency for purposes of immigrant proceedings, such as questioning the individual simply, continuing proceedings to allow for evidence gathering, allowing assistance from friends and family, asking the respondent about his or her psychiatric medication, and arranging for a psychiatric evaluation. *Matter of M-A-M-*, 25 I&N Dec. at 480–81.

Here, the medical report on which the IJ relied to determine competency was at least a year old. The panel thus held the IJ assessed the respondent's competency "without support in inferences that may be drawn from the facts in the record." *Citing Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012). It further held the IJ failed to evaluate whether the respondent's current mental illness prevented him from meaningfully participating in his immigration proceedings by failing to assure that DHS had provided the respondent's most recent medical records. The panel concluded that this omission violated *M-A-M-*'s rigorous procedural requirements.

C. *Gomez-Sanchez v. Sessions*, 887 F.3d 893 (9th Cir. 2018)

Issues: Particularly Serious Crimes, Mental Health, *Chevron* Deference

Holding: The Board's interpretation of INA § 241(b)(3)(B)(ii) in *Matter of G-G-S-*, 26 I&N Dec. 339, 339 (BIA 2014), holding that evidence related to a petitioner's mental health could not be considered when addressing whether the petitioner had committed a particularly serious crime, is not entitled to *Chevron* deference because it is contrary to congressional intent and unreasonable.

Practical Effect: An Immigration Judge must consider evidence regarding a respondent's mental condition at the time of committing a crime

when engaging in an individualized determination of whether the offense constitutes a particularly serious crime.

Case Summary: The panel held that the Board's blanket rule against considering evidence of an individual's mental health at the time of committing the offense is contrary to Congress's intent that the particularly serious crime determination is a case-by-case determination. Further, the panel found that the Board's rationale for precluding mental health-related evidence— that considering such evidence requires the Agency to "reassess any ruling on criminal culpability"— was unreasonable and contrary to the Board's own precedent.

D. *Salgado v. Sessions*, — F.3d — (9th Cir. May 8, 2018)

Issues: Mental Incompetency

Holding: Without evidence of inability to understand the nature and object of the proceedings, an alien's complaints of poor memory are insufficient to show mental incompetency in removal proceedings.

Practical Effect: An Immigration Judge may find an alien who complains of poor memory mentally competent when there is no evidence that the alien does not comprehend the nature and object of the proceedings.

Case Summary: The respondent claimed before an Immigration Judge that he suffered from memory loss because of a car accident. The Immigration Judge nevertheless found that he was competent to testify and denied the respondent's motion to continue the hearing for a medical exam. The BIA affirmed the Immigration Judge's finding of mental competency.

The panel applied the standard for mental incompetency set forth in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011) and endorsed by *Calderon-Rodriguez v. Sessions*, 878 F.3d 1179 (9th Cir. 2018), and *Mejia v. Sessions*, 868 F.3d 1118 (9th Cir. 2017). Under that standard, to demonstrate mental incompetency, the alien must show some inability to comprehend or to assist and participate in the proceedings, some inability to consult with or assist his counsel, and lack of a reasonable opportunity to present evidence and examine witnesses, including cross-examination of opposing witnesses. In this case, the panel observed that the respondent was represented by counsel and was able to meaningfully assist

his counsel's defense efforts. Based on this observation, the panel concluded there was no evidence that the respondent did not comprehend the nature and object of the proceedings and denied his petition for review.

XII. Miscellaneous Removability Issues

A. *Minto v. Sessions*, 854 F.3d 619 (9th Cir. 2017)

Issues: Admission, Removability

Holding: (1) Minto is deemed to be making a continuing application for admission to the United States and is removable under INA § 212(a)(7)(A)(i)(I), and (2) interpreting INA § 212(a)(7)(A)(i)(I) to apply to Minto does not contravene Congressional intent.

Practical Effect: Immigrants residing in the CNMI without valid immigration documents may be found removable under INA § 212(a)(7)(A)(i)(I).

Case Summary: The Commonwealth of the Northern Mariana Islands ("CNMI") entered into a "Covenant" with the United States in 1976, giving the United States complete responsibility over many governmental functions but notably retaining complete control over their immigration and naturalization system. By an act of Congress, United States immigration laws took effect in the CNMI on November 28, 2009. *See* 48 U.S.C. § 1806(a)(1).

Minto is a citizen of Bangladesh who resided in the CNMI since 1997, after receiving an entry permit that was subject to incomplete revocation proceedings under CNMI law when the shift to United States immigration laws took effect.

In 2010, the Department of Homeland Security initiated removal proceedings against Minto. The Immigration Judge sustained the charge of removability under INA § 212(a)(7)(A)(i)(I), and Minto appealed. The Ninth Circuit held that the Immigration Judge and Board of Immigration Appeals correctly found that INA § 212(a)(7)(A)(i)(I) applied to Minto. The panel reviewed the three requirements of INA § 212(a)(7)(A)(i)(I): being an "immigrant," who "at the time of application for admission," lacks a valid entry document. The Ninth Circuit noted that the first and third prongs of this definition were not in dispute. Instead, the panel focused on whether Minto was an "applicant for admission." The panel held that Minto was an

applicant for admission because he was present in the CNMI at the time that United States immigration laws first took effect there in November 2009 and was not offered a visa available for lawfully present nonimmigrant workers in the CNMI. *See* 48 U.S.C. § 1806(d)(2). Because Minto lacked lawful immigration status in the CNMI prior to November 2009, he was correctly deemed to have a continuing application for admission to the United States. *See Matter of Valenzuela-Felix*, 26 I&N Dec. 53, 59 (BIA 2012).

B. *Ledezma-Cosino v. Sessions*, 857 F.3d 1042 (9th Cir. 2017) (en banc)

Issues: Cancellation of Removal, Good Moral Character, Habitual Drunkard

Holding: The term "habitual drunkard" is not unconstitutionally vague because it "readily lends itself to an objective factual inquiry," and the statutory "habitual drunkard" provision does not violate equal protection under rational basis review.

Practical Effect: When determining whether an applicant is eligible for cancellation of removal, Immigration Judges may deny an application based on lack of good moral character where the applicant is a "habitual drunkard."

Case Summary: Petitioner argued that substantial evidence does not support the agency's finding that he was a "habitual drunkard," that the statutory "habitual drunkard" provision is unconstitutionally vague, and that the provision violates equal protection principles. The Ninth Circuit, sitting en banc, rejected these three arguments. The ordinary meaning of "habitual drunkard" is a person who regularly drinks alcoholic beverages to excess. The Court found that substantial evidence supports the finding that Petitioner was a "habitual drunkard," including Petitioner's 2008 DUI conviction, his liver failure due to excessive alcohol consumption, and his history of alcohol abuse, marked by consuming an average of one liter of tequila per day for more than ten years. The Court did not decide whether "public harm" is a necessary component of the "habitual drunkard" definition but noted that Petitioner's DUI conviction was a public harm. The Court also acknowledged that not all alcoholics are habitual drunkards.

Additionally, the Ninth Circuit found that the statutory "habitual drunkard" provision is not unconstitutionally vague because it lends itself to an objective factual inquiry. Specifically, the

Court noted that a person of ordinary intelligence would have fair notice that the term encompasses an average daily consumption of one liter of tequila for a 10-year period, ultimately leading to a DUI conviction.

Lastly, the Ninth Circuit found that the statutory provision does not violate equal protection principles. The Court determined that denying cancellation of removal to habitual drunkards is rationally related to the legitimate governmental interest in public safety, and under rational basis review, Congress reasonably could have concluded that because regular excessive drinkers pose increased risks to themselves and to others, cancellation of removal was unwarranted.

XIII. Ninth Circuit Corroboration Guide (under the REAL ID Act of 2005)

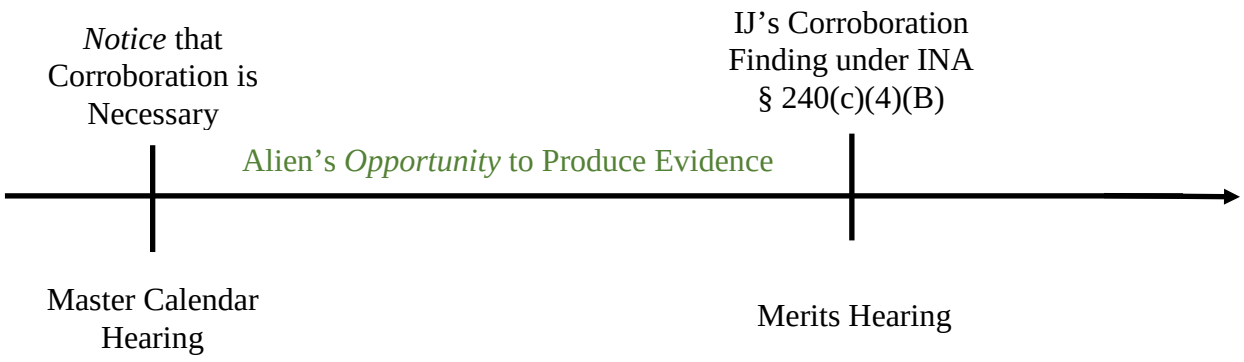
An immigration judge may require a respondent to "provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence." INA § 240(c)(4)(B).

An immigration judge is required to engage in a sequential analysis that provides the respondent *notice* that corroboration is required to meet their burden of proof. *Ren v. Holder*, 648 F.3d 1079, 1093 (9th Cir. 2011). Restated, a credible respondent must be informed that corroborative evidence is required and be provided an opportunity (at a later hearing) to produce that evidence. Two recent Ninth Circuit cases clarify the corroboration analysis and make it easier for judges to make a corroboration finding.

First, *Liu v. Sessions*, — F.3d —, 2018 WL 2450401 (9th Cir. 2018), held that an immigration judge may provide a respondent with notice that corroboration is required ***at the master calendar hearing*** by making explicit statements on the record that supplemental materials would be required. Because the failure to corroborate is an independent, sufficient basis to deny a respondent's applications for relief, *see Aden v. Holder*, 589 F.3d 1040, 1043–45 (9th Cir. 2009), immigration judges should ascertain the factual basis of a respondent's applications for relief at the master calendar hearing and articulate the types of evidence that will be necessary to corroborate the respondent's claims.

Second, *Wang v. Sessions*, 861 F.3d 1003, 1009 (9th Cir. 2017), held that an immigration judge is ***not*** required to provide a respondent notice that corroborative evidence is required if the immigration judge finds that the respondent failed to provided credible testimony. Immigration Judges should therefore include—when relevant—a separate corroboration finding if the respondent failed to testify credibly, which discusses the evidence in the record and explains why it is not sufficient to meet the respondent's burden of proof.

A. Corroboration Timeline



B. Corroboration Standard Language

Because this application was filed after May 11, 2005, the corroboration standard established by the REAL ID Act, 119 Stat. 231 (2005), applies. After reviewing the evidence in the record and based on the factual basis for the respondent's applications for relief, I find that corroborative evidence is required in this case in order for the respondent to carry her/his burden of proof. INA §§ 208(b)(1)(B)(ii), 241(b)(3)(C).

In this case, respondent should submit: **[identify types of evidence based on the facts of the case]**.

If the respondent is unable to provide the evidence I just identified then she/he should submit a written pre-hearing statement explaining why that evidence is not reasonably available at least 10 days prior to the next hearing. 8 C.F.R. §§ 1003.21(b), 1003.23(a). If the respondent fails to submit the corroborative evidence I just requested or a written explanation of why that evidence is not reasonably available, the court may deny his application for that reason alone. *See Aden v. Holder*, 589 F.3d 1040, 1043–45 (9th Cir. 2009).

**** The foregoing language is an example of standard language that can be employed at master calendar hearings. Immigration Judges are free to exercise independent judgement to modify and employ the language as they see fit.*